TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 49

VALENTINE GOESAERT, MARGARET GOESAERT, GERTRUDE NADROSKI AND CAROLINE McMAHON, APPELLANTS,

vs.

OWEN J. CLEARY, FELIX H. H. FLYNN AND G. MENNAN WILLIAMS, MEMBERS OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

FILED MAY 1, 1948.

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 6618

VALENTINE GOESAERT and MARGARET GOESAERT, Plaintiffs,

vs.

OWEN J. CLEARY, FELIX H. H. FLYNN and G. MENNEN WILLIAMS, members of the Liquor Control Commission of the State of Michigan, Defendants

AMENDED COMPLAINT—Filed April 28, 1947

Now come Valentine Goesaert and Margaret Goesaert, the above named plaintiffs, and represent unto this Honorable Court as follows:

I

That they are citizens and residents of the City of Dearborn, County of Wayne, State of Michigan.

II

The defendants Owen J. Cleary, Felix H. H. Flynn and G. Mennen Williams are members of the Liquor Control Commission of the State of Michigan, which is a commission existing under and by virtue of Act No. 8 of the Public Acts of 1933 (Extra Session) of the State of Michigan, known as the "Liquor Law."

III

Plaintiffs further say that they bring this action in this Court by virtue of Title 28, Section 41, Subdivision (1) of the Judicial Code and Judiciary of the United States Code Annotated (the Code of the Laws of the United States of America) because the action arises under the Constitution of the United States, Section 1 of the 14th Amendment to the Constitution of the United States of America; and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

[fol. 2]

IV

Plaintiffs further say that they bring this action in their own behalf and in behalf of others similarly situated, in pursuance of the Rules of Civil Procedure in such case made and provided; and further say that they represent women who are joint owners with their husbands or other men and who act as barmaids in the establishments in which they have a joint interest.

V

Plaintiff Valentine Goesaert further says that she is the owner of a duly licensed bar in the City of Dearborn, and also works as a barmaid therein; that the plaintiff Margaret Goesaert is her daughter, whom she employs as a barmaid in her bar in the City of Dearborn; and that both plaintiffs have become experienced barmaids or bartenders by reason of years of experience, and that the ownership of the bar by plaintiff Valentine Goesaert and the occupation therein by her daughter, are and have been for some time their means of livelihood.

VI

Plaintiff Valentine Goesaert further says that she has invested large sums of money in and about her place of business in the City of Dearborn, and that as an owner, she has also served as a barmaid in her own business, and employs her daughter, plaintiff Margaret Goesaert as a barmaid in her place of business.

VII

Plaintiffs further say that on or about the 30th day of April, 1945, the Legislature of the State of Michigan adopted a certain Act, which is Act 133 of the Public Acts of the State of Michigan for 1945, and which provides: (Section 19 (a) of the Liquor Control Act, being Section 18.990 (1) of the Michigan Statutes Annotated, 1946 Cum. Supp.):

> "No person shall act as bartender in any establishment licensed under this act to sell alcoholic liquor for consumption on the premises in any city now or hereafter having a population of 50,000 or more, unless such person shall be licensed by the commission under the provisions of this section: Provided, That the com-
> [fol. 3] mission may adopt rules and regulations governing the licensing of bartenders in other political

subdivisions of the state. Such licenses shall expire on the thirtieth day of April following the issuance thereof. An annual license fee of $2.00 shall be paid by each applicant, which shall be credited to the general fund of the state. Each applicant for license shall be a male person 21 years of age or over, shall submit a certificate from his local board of health or health officer showing that such person is not affected with any infectious or communicable disease, and shall meet the requirements of the commission; Provided, That the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish. A license issued under the provisions of this section may be revoked or suspended by the commission in case the licensee shall drink on duty or shall violate the rules and regulations of the commission. In case of the refusal to issue or the revocation or suspension of a license by the commission, the person aggrieved shall be entitled to a hearing before the commission. The findings of the commission at such hearing shall be final as to questions of fact. The commission shall issue to each licensee an identification card to which shall be attached a photograph of the licensee. Such identification card shall be carried by the licensee at all times while on duty and shall be shown by such licensee on request. For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar."

VIII

Plaintiffs further say that the City of Dearborn has a population in excess of 50,000 according to the last Federal census, and that the defendants have threatened to prevent said plaintiffs from engaging in their occupation of barmaids or bartenders by virtue of said Act.

IX

Plaintiffs further say that the defendants have threatened to enforce the provisions of the law as of May 1, 1947, and have threatened to prevent the plaintiffs, either as owner or as barmaid, from acting as bartenders, either in

their own establishments or in bars owned by others, and that if said defendants are permitted to carry such threats into execution, these plaintiffs will be unable to engage in their occupation on and after May 1, 1947.

X

Plaintiff Valentine Goesaert further says that as the owner of a duly licensed bar, she will be prevented, com- [fol. 4] mencing with May 1, 1947, from either acting as a barmaid herself in her own establishment, or from hiring a woman as a barmaid, and she will be compelled to discharge her daughter, plaintiff Margaret Goesaert, now in her employ, and will be compelled to hire only male bartenders, unless the defendants are restrained by a temporary restraining order of this Court.

XI

Plaintiffs further say that unless a temporary restraining order is granted immediately, plaintiffs will suffer immediate and irreparable injury, loss and damage, in that plaintiff owner will either have to hire a bartender and pay him wages, or close her place of business; and plaintiff Margaret Goesaert will suffer immediate and irreparable injury, loss and damage in that she will be unable to continue in her occupation as a barmaid and will be discharged from her employment and thereupon become unemployed.

XII

Plaintiffs further say that while the law is in effect, defendants have made no attempt to enforce the same, but have threatened that they will commence enforcing the same on May 1, 1947; that immediate and irreparable injury, loss and damage will result to the plaintiffs unless said defendants are restrained by a temporary restraining order of this Court.

XIII

Plaintiffs further say that said Act denies to the said plaintiffs the equal protection of the laws and deprives them of their property without due process of law, and is a violation of the Constitutional rights of these plaintiffs, and is a violation of Amendment 14, Section 1, of the Constitution of the United States of America, which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 5]

XIV

Plaintiffs further say that said Act is discriminatory and unreasonable, and if defendants are permitted to carry the said Act into effect, plaintiffs will suffer great and irreparable injury; and that they will be deprived of their property without due process of law, in that they will be deprived of their means of livelihood, if the defendants enforce said Act, as they have threatened to do; and that the threatened action on the part of defendants will cause additional damage to plaintiff Valentine Goesaert in that she will be compelled either to close her place of business or hire male bartenders, and she will lose the investment of years of work and savings.

XV

Plaintiff Margaret Goesaert further says that she will be deprived of her property without due process of law if the defendants are permitted to carry said Act into effect on May 1, 1947, as threatened, because she will lose her job and will be unemployed and will have no means of livelihood or subsistence.

XVI

Plaintiffs further say that the Act is in violation of Section 1 of the 14th Amendment to the Constitution of the United States, for the following reasons:

(1) It denies the plaintiffs the equal protection of the laws, and, if enforced by defendants, will deprive plaintiffs of their property without due process of law, because it sets up an arbitrary standard of 50,000 as the population of any community to come under the Act;

(2) It discriminates against women owners;

(3) It discriminates against women bartenders;

(4) It discriminates between daughters of male and female owners;

(5) It discriminates between waitresses and female bartenders;

(6) Because the discrimination is arbitrary and unreasonable, in view of the fact that the provisions of the Liquor [fol. 6] Law of the State of Michigan are adequate to provide for proper supervision and regulation of the sale of alcoholic beverages, without the Act herein complained of;

(7) That the attempted classification is unreasonable and arbitrary;

(8) Because the Act, upon its face, shows an unjust and unfair classification, both as to sex and communities based upon population;

(9) The classification attempted in said Act is not within the police power of the State of Michigan;

(10) The attempted classification has nothing to do with the regulation of the liquor traffic in the State of Michigan, the said liquor traffic being fully regulated by previous statutes and rules and regulations of the defendants.

XVII

Plaintiffs further say that unless a temporary restraining order is issued restraining the defendants from carrying the provisions of the Act complained of into effect, these plaintiffs will suffer great and irreparable injury, as hereinabove set forth.

XVIII

Plaintiffs further say that immediate and irreparable injury, loss and damage will result to them before notice can be given and a hearing had thereon, unless a temporary restraining order is issued by this Court restraining the defendants from carrying the provisions of the Act complained of into effect on May 1, 1947.

XIX

Wherefore, plaintiffs, in their own behalf and in behalf of others similarly situated and whom they represent, pray:

(1) That the defendants may be restrained by an Order and injunction of this Court, in pursuance of Section 380, Title 28 of the Judicial Code and Judiciary of the Code of Laws of the United States, being Section 266 of the Judicial Code as amended, and the rules of Civil Procedure in such case made and provided, from enforcing the provisions of [fol. 7] Section 19 (a) of the Liquor Act added by Act No. 133 of the Public Acts of the State of Michigan for 1945.

(2) That upon the final hearing of this cause this Court will find that said Act if enforced would deprive the plaintiffs of their property without due process of law and would deprive the plaintiffs of the equal protection of the laws, and is therefore in violation of Section 1 of the 14th Amendment to the Constitution of the United States of America.

(3) That upon the final hearing of this cause, a permanent injunction issue restraining the defendants from enforcing the said Act.

(4) That the plaintiffs may have such other and further relief as shall be proper and as shall be agreeable to equity.

Valentine Goesaert, Margaret Goesaert, Plaintiffs;
Davidow & Davidow, by Anne R. Davidow, Attorneys for Plaintiffs.

Duly sworn to by Valentine Goesaert, et al. Jurat omitted in printing.

[fol. 8] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 6619

GERTRUDE NADROSKI and CAROLINE MCMAHON, Plaintiffs,

vs.

OWEN J. CLEARY, FELIX H. H. FLYNN, and G. MENNEN WILLIAMS, Members of the Liquor Control Commission of the State of Michigan, Defendants

AMENDED COMPLAINT—Filed April 28, 1947

Now come Gertrude Nadroski and Carolyn McMahon, the above named plaintiffs, and represent unto this Honorable Court as follows:

I

That they are citizens and residents of the City of Dearborn, County of Wayne, State of Michigan.

II

That defendants Owen J. Cleary, Felix H. H. Flynn and G. Mennen Williams are members of the Liquor Control Commission of the State of Michigan, which is a commission existing under and by virtue of Act No. 8 of the Public Acts of 1933 (Extra Session) of the State of Michigan, known as the "Liquor Law."

III

Plaintiffs further say that they bring this action in this Court by virtue of Title 28, Section 41, Subdivision (1) of the Judicial Code and Judiciary of the United States Code Annotated (the Code of the Laws of the United States of America) because the action arises under the Constitution of the United States, Section 1 of the 14th Amendment to the Constitution of the United States of America; and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

[fol. 9] IV

Plaintiffs further say that they bring this action in their own behalf and in behalf of others similarly situated, in

pursuance of the Rules of Civil Procedure in such case made and provided; and further say that they represent seven (7) women bar owners, and fifty (50) barmaids, in the City of Dearborn.

V

Plaintiff Carolyn McMahon says that she is the owner of a bar and also works as a barmaid therein; and plaintiff Gertrude Nadroski says that she is a barmaid employed in a retail liquor establishment in the City of Dearborn; that they have become experienced barmaids or bartenders by reason of years of work and efforts, and that this occupation is and has been for some time their means of livelihood.

VI

Plaintiff Carolyn McMahon further says that she has invested large sums of money in and about her place of business in the City of Dearborn, and that as an owner, she has also served as a barmaid in her own business, and employs a barmaid in her place of business.

VII

Plaintiffs further say that on or about the 30th day of April, 1945, the Legislature of the State of Michigan adopted a certain Act, which is Act 133 of the Public Acts of the State of Michigan for 1945; and which provides: (Section 19(a) of the Liquor Control Act, being Section 18.990 (1) of the Michigan Statutes Annotated, 1946, Cum. Supp.):

> "No person shall act as bartender in any establishment licensed under this act to sell alcoholic liquor for consumption on the premises in any city now or hereafter having a population of 50,000 or more, unless such person shall be licensed by the commission under the provisions of this section; Provided, That the commission may adopt rules and regulations governing the licensing of bartenders in other political subdivisions of the state. Such licenses shall expire on the thirtieth day of April following the issuance thereof. An annual license fee of $2.00 shall be paid by each applicant, which shall be credited to the general fund of the state. Each applicant for license shall be a [fol. 10] male person 21 years of age or over, shall submit a certificate from his local board of health or health

officer showing that such person is not affected with any infectious or communicable disease, and shall meet the requirements of the commission; Provided, That the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish. A license issued under the provisions of this section may be revoked or suspended by the commission in case the licensee shall drink on duty or shall violate the rules and regulations of the commission. In case of the refusal to issue or the revocation or suspension of a license by the commission, the person aggrieved shall be entitled to a hearing before the commission. The findings of the commission at such hearing shall be final as to questions of fact. The commission shall issue to each licensee an identification card to which shall be attached a photograph of the licensee. Such identification card shall be carried by the licensee at all times while on duty and shall be shown by such licensee on request. For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar."

VIII

Plaintiffs further say that the City of Dearborn has a population in excess of 50,000 according to the last Federal census, and that the defendants have threatened to prevent said plaintiffs from engaging in their occupation of barmaids or bartenders by virtue of said Act.

IX

Plaintiffs further say that the defendants have threatened to enforce the provisions of the law as of May 1, 1947, and have threatened to prevent the plaintiffs, either as owner or as barmaid, from acting as bartenders, either in their own establishments or in bars owned by others, and that if said defendants are permitted to carry such threats into execution, these plaintiffs will be unable to engaged in their occupation on and after May 1, 1947.

X

Plaintiff Carolyn McMahon further says that as the owner of a duly licensed bar, she will be prevented, commencing with May 1, 1947, from either acting as a barmaid herself in her own establishment, or from hiring a woman as a barmaid, and she will be compelled to discharge the barmaid now in her employ, and will be compelled to hire only [fol. 11] male bartenders, unless the defendants are restrained by a temporary restraining order of this Court.

XI

Plaintiffs further say that unless a temporary restraining order is granted immediately, plaintiffs will suffer immediate and irreparable injury, loss and damage, in that plaintiff owner will either have to hire a bartender and pay him wages, or close her place of business; that plaintiff barmaid will suffer immediate and irreparable injury, loss and damage in that she will be unable to continue in her occupation as a barmaid and will be discharged from her employment and thereupon become unemployed.

XII

Plaintiffs further say that while the law is in effect, defendants have made no attempt to enforce the same, but have threatened that they will commence enforcing the same on May 1, 1947; that immediate and irreparable injury, loss and damage will result to the plaintiffs unless said defendants are restrained by a temporary restraining order of this Court.

XIII

Plaintiffs further say that said Act denies to the said plaintiffs the equal protection of the laws and deprives them of their property without due process of law, and is a violation of the Constitutional rights of these plaintiffs, and is a violation of Amendment 14, Section 1, of the Constitution of the United States of America, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

XIV

Plaintiffs further say that said Act is discriminatory and unreasonable, and if defendants are permitted to carry the said Act into effect, plaintiffs will suffer great and irreparable injury; and that they will be deprived of their prop- [fol. 12] erty without due process of law, in that they will be deprived of their means of livelihood, if the defendants enforce said Act, as they have threatened to do; and that the threatened action on the part of defendants will cause additional damage to plaintiff Carolyn McMahon in that she will be compelled either to close her place of business or hire male bartenders, and she will lose the investment of years of work and savings.

XV

Plaintiff Gertrude Nadroski further says that she will be deprived of her property without due process of law if the defendants are permitted to carry said Act into effect on May 1, 1947, as threatened, because she will lost her job and will be unemployed and will have no means of livelihood or subsistence.

XVI

Plaintiffs further say that the Act is in violation of Section 1 of the 14th Amendment to the Constitution of the United States, for the following reasons:

(1) It denies the plaintiffs the equal protection of the laws, and, if enforced by defendants, will deprive plaintiffs of their property without due process of law, because it sets up an arbitrary standard of 50,000 as the population of any community to come under the act;

(2) It discriminates against women owners;

(3) It discriminates against women bartenders;

(4) It discriminates between daughters of male and female owners;

(5) It discriminates between waitresses and female bartenders;

(6) Because the discrimination is arbitrary and unreasonable, in view of the fact that the provisions of the Liquor Law of the State of Michigan are adequate to provide for proper supervision and regulation of the sale of alcoholic beverages, without the Act herein complained of;

(7) That the attempted classification is unreasonable and arbitrary;

[fol. 13] (8) Because the Act, upon its face, shows an unjust and unfair classification, both as to sex and communities based upon population;

(9) The classification attempted in said Act is not within the police power of the State of Michigan;

(10) The attempted classification has nothing to do with the regulation of the liquor traffic in the State of Michigan, the said liquor traffic being fully regulated by previous statutes and rules and regulations of the defendants.

XVII

Plaintiffs further say that unless a temporary restraining order is issued restraining the defendants from carrying the provisions of the Act complained of into effect, these plaintiffs will suffer great and irreparable injury, as hereinabove set forth.

XVIII

Plaintiffs further say that immediate and irreparable injury, loss and damage will result to them before notice can be given and a hearing had thereon, unless a temporary restraining order is issued by this Court restraining the defendants from carrying the provisions of the Act complained of into effect on May 1, 1947.

XIX

Wherefore plaintiffs, in their own behalf and in behalf of others similarly situated and whom they represent, pray:

(1) That the defendants may be restrained by an order and injunction of this Court, in pursuance of the statute and the rules of civil procedure in such case made and

provided, from enforcing the provisions of Section 19(a) of the Liquor Act added by Act No. 133 of the Public Acts of the State of Michigan for 1945.

(2) That upon the final hearing of this cause this Court will find that said Act if enforced would deprive the plaintiffs of their property without due process of law and would deprive the plaintiffs of the equal protection of the laws, and is therefore in violation of Section 1 of the 14th Amendment to the Constitution of the United States of America.

[fol. 14] (3) That upon the final hearing of this cause, a permanent injunction issue restraining the defendants from enforcing the said Act.

(4) That the plaintiffs may have such other and further relief as shall be proper and as shall be agreeable to equity.

(Signed) Gertrude Nadroski,, Carolyn McMahon, Plaintiffs; Davidow & Davidow, by Anne R. Davidow, Attorneys for Plaintiffs.

Duly sworn to by Gertrude Nadroski, et al. Jurat omitted in printing.

[fol. 15] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

ORDER FOR HEARING ON APPLICATION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER—Filed April 28, 1947

At a session of said Court held at the Federal Building in the City of Detroit, on this 28th day of April, 1947

Present: The Honorable Theodore Levin, United States District Judge.

It appearing to the Court that plaintiffs have filed their Amended Bill of Complaint in this Court and cause wherein they make application to this Court for a temporary injunction restraining the defendants from enforcing Section 19(a) of the Liquor Law of the State of Michigan, which

was added by Act 133 of the Public Acts of the State of Michigan for 1945, and it further appearing to this Court that said application is based upon the ground of the unconstitutionality of such statute, and it further having been represented to the Court that it appearing to the Court that irreparable loss or damage would result to the complainants unless a temporary restraining order is granted prior to the hearing and determination of the application for an interlocutory injunction because the plaintiffs will be [fol. 16] deprived of the right to engage in their occupation, either in their own place of business or as barmaids, after the 1st day of May, 1947, therefore,

It Is Ordered that the defendants, Owen J. Cleary, Felix H. H. Flynn and G. Mennen Williams, members of the Liquor Control Commission of the State of Michigan, be and are hereby restrained from enforcing Section 19(a) of the Liquor Law of the State of Michigan, which was added by Act 133 of the Public Acts of the State of Michigan for 1945, until the hearing of the application for an interlocutory injunction, or until the further order of this Court.

It Is Further Ordered that the application for an interlocutory injunction be heard before a Court of three judges, at the Court House in the City of Detroit, County of Wayne, State of Michigan, on the 6th day of May, 1947, at 10 a. m. on that day or as soon thereafter as counsel may be heard, in pursuance of Section 380, Title 28 of the Judicial Code and Judiciary, United States Code Annotated, of the Laws of the United States, and that a copy of this Order, together with a copy of the Amended Complaint be served upon said defendants at least five days before the date of the hearing as hereinabove set forth.

Theodore Levin, United States District Judge.

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

[Title omitted]

MOTION TO DISMISS COMPLAINT

Defendants above named move to dismiss the Complaint on file herein for the following reasons:

1. Lack of jurisdiction over the subject matter;

2. Failure to state a claim upon which relief can be granted.

Eugene F. Black, Attorney General of Michigan; Ben H. Cole, Assistant Attorney General, Attorneys for Defendants, 1900 Cadillac Square Bldg., Detroit 26, Michigan, Randolph 5083.

Dated: May 20, 1947.

[fol. 18] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

[Title omitted]

NOTICE OF HEARING ON MOTION TO DISMISS

To Davidow & Davidow, Attorneys for Plaintiffs, 3210 Book Tower, Detroit 26, Michigan:

Take Notice that the within Motion to Dismiss the Complaint in the above cause will be heard by said Court at the Federal Building, in the City of Detroit, on Tuesday, May 27, 1947, at the opening of court on that day.

Eugene F. Black, Attorney General of Michigan; Ben H. Cole, Assistant Attorney General, Attorneys for Defendants, 1900 Cadillac Square Building, Detroit 26, Michigan, Randolph 5083.

Dated: May 20, 1947.

[fol. 19] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

MOTION TO DISMISS COMPLAINT

Defendants above named move to dismiss the Complaint on file herein for the following reasons:

1. Lack of jurisdiction over the subject matter;

2. Failure to state a claim upon which relief can be granted.

Eugene F. Black, Attorney General of Michigan; Ben H. Cole, Assistant Attorney General, Attorneys for Defendants, 1900 Cadillac Square Bldg., Detroit 26, Michigan, Randolph 5083.

Dated May 20, 1947.

[fol. 20] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619. Civil Action No. 6618

[Titles omitted]

ORDER FOR CONTINUANCE—Filed June 23, 1947

At a session of said Court held at the Federal Building in the City of Detroit, on this 23d day of June, A. D. 1947.

Present: The Honorable Theodore Levin, U. S. District Judge.

The parties to the above entitled cause, through their counsel, upon application to the Court for Continuance of the hearing in open Court on the application for Interlocutory Injunction, and the hearing on the motion to dismiss,

It Is Ordered that the hearings on the Application for Interlocutory Injunction and the Motion to Dismiss, be and the same are hereby adjourned from June 24, 1947, at 10:00 A. M., until September 9, 1947, at 10:00 A. M.

It Is Further Ordered that the Temporary Restraining Order heretofore entered in said cause restraining the Defendants from enforcing Section 19(a) of Act 133 of the

Public Acts of the State of Michigan for 1945 until the hearing on the Application for Interlocutory Injunction, or until the further Order of this Court be continued in full [fol. 21] force and effect until the hearing on said Application for Interlocutory Injunction or until the further order of this Court:

Theodore Levin, United States District Judge.

[fol. 22] IN THE DISTRICT COURT OF THE UNITED STATES

No. 6619

[Title omitted]

AFFIDAVIT OF CORA J. WILLIAMS

STATE OF MICHIGAN,
County of Wayne, ss:

Cora J. Williams, being duly sworn, deposes and says that she is a citizen of the United States of America, and a citizen of the City of Dearborn, Michigan, residing at 23481 Michigan Avenue, Dearborn.

Deponent further says that she is employed as a barmaid at Knauff's Bar, at 23481 Michigan Avenue, Dearborn, which bar is owned by deponent's sister, Mrs. May D. Knauff, and that said May D. Knauff was the first person to obtain a license to sell liquor at retail in the City of Dearborn; and that she has owned the present bar for a period of two years and upwards.

Deponent further says that she is married and living with her husband who has been ill for a period of over two years, and that her earnings as a barmaid help to support her husband, as well as herself; that because she is able to live on property adjacent to the bar, she is able to work and at the same time to take care of her invalid husband.

Deponent further says that her sister, the owner of the said bar, is also in ill health and under medical attention and deponent is frequently called upon to take complete charge of the bar, as well as act as barmaid.

Deponent further says that she has become an experienced barmaid by reason of having worked at the job intermittently for a number of years since the Liquor Law was first

passed in Michigan, and that she *she* has worked steadily. [fol. 23] at the job for a period of two years next preceding the making of this affidavit; that if the Liquor Law is permitted to be enforced, deponent will be deprived of her means of livelihood and will be unable to work and help take care of her invalid husband.

Deponent further says that there has never been any complaint of any kind made against her sister, the owner of said bar, or against this deponent, and that deponent and her sister have always been law-abiding citizens.

Deponent further says that by reason of the premises, she would be unable to obtain other employment because she can be employed only on such job as would make it possible for her to take care of her husband and her sister at the same time.

Deponent further says that customers who come in have expressed to this deponent and her sister their belief that women barmaids are an asset to a business because men refrain from becoming intoxicated and from using profanity in the presence of women.

Deponent further says that on Monday, April 28, 1947, a prospective customer came into the bar operated by the sister of this deponent; that deponent, being at the bar at the time, informed said prospective customer that in her opinion he had already had enough to drink; that thereupon the prospective customer said to this deponent: "Thank you for telling me. I am glad I found somebody who knows when I have had enough, because I don't realize it myself," and that he thereupon walked out without being served any drinks.

And further deponent says that the enforcement of the law would, by reason of the facts and circumstances hereinabove set forth, cause this deponent great and irreparable injury.

And further deponent saith not.

Cora J. Williams.

Subscribed and sworn to before me this 29th day of April, A. D. 1947, Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 24] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF EVA SIENBOR

STATE OF MICHIGAN,
County of Wayne, ss:

Eva Sienbor, being duly sworn, deposes and says that she is a citizen of the United States of America, and a citizen and resident of the City of Dearborn, County of Wayne, State of Michigan, and resides at 7311 Yinger Avenue in the City of Dearborn.

Deponent further says that she owns property in the City of Dearborn on which she pays taxes.

Deponent further says that she is a barmaid employed by Julia Bavake, who is the owner of a Class "C" bar at 14526 West Warren Avenue in the City of Dearborn; and that she has been employed by the said Julia Bavake since 1941; and that, as far as she knows there has never been any complaint against this deponent or her employer, Julia Bavake, in the operation of the bar owned by the said Julia Bavake, and that this deponent has always been a law-abiding citizen.

Deponent further says that she started to learn the occupation of barmaid shortly after the Liquor Law was adopted in Michigan, and that she has been an experienced barmaid for a period of eleven years.

Deponent further says that she knows no other occupation and that the occupation of barmaid is her only means of livelihood; that she has two grown children who [fol. 25] are married and who have their own responsibilities in maintaining and financing their own households, and that deponent cannot expect any financial assistance from them; that she has obligations to meet in maintaining her property and in paying taxes and in supporting herself, and that if she is prevented from engaging in her occupation as a barmaid, she will be deprived of her livelihood and will be unable to meet her obligations and may lose her property as a result thereof.

Deponent further says that she is past middle age and is therefore unable to learn any new occupation or job.

Deponent further says that she makes this affidavit in support of the application of the plaintiffs in the above entitled cause for the issuance of a temporary injunction to restrain the Liquor Control Commission from enforcing Section 19(a) of the Liquor Law of Michigan, which was added by Act 133 of the Public Acts of 1945.

And further deponent saith not.

Eva Sienbor.

Subscribed and sworn to before me this 29th day of April, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 26] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF GLADYS HODGSON

STATE OF MICHIGAN,
County of Wayne, ss:

Gladys Hodgson, being duly sworn, deposes and says that she resides at 10037 Burley Avenue in the City of Dearborn, and that she is employed as a barmaid at the Dix Bar located at 10425 Dix Avenue in the City of Dearborn, County of Wayne, State of Michigan.

Deponent further says that she makes this affidavit in support of the application of the plaintiffs for an interlocutory injunction in the above entitled cause, and that she is one of the persons in whose behalf the Complaint was filed.

Deponent further says that she has been employed as a barmaid at the Dix Bar for a period of seven years, and that it is her only means of livelihood; that prior to becoming a barmaid, she was a waitress, and that she learned the occupation of barmaid and was promoted to the position of barmaid, at which she earns larger wages than she earned as a waitress.

Deponent further says that unless a temporary injunction is granted in the above entitled cause, her employer will be

compelled to discharge her from her employment, and she will be then unemployed, as she will be unable to obtain any other employment, having no training or experience therefor.

[fol. 27] Deponent further says that it has been her experience, as a barmaid, and in observing other bars in which barmaids are employed, that the establishments where barmaids are employed are kept cleaner, and the rules and regulations of the Liquor Control Commission are carried out to the letter, than in bars where the bartenders are male.

Deponent further says that during all the years she has been employed at the Dix Bar, neither she nor the owner of the Dix Bar has ever been complained against for any violation of the Liquor Law or any regulation of the Liquor Control Commission.

And further deponent saith not.

Gladys Hodgson.

Subscribed and sworn to before me this 1st day of May, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 28] IN THE DISTRICT COURT OF THE UNITED STATES

No. 6619

[Title omitted]

AFFIDAVIT OF MARGARET GREGOR

STATE OF MICHIGAN,
County of Wayne, ss:

Margaret Gregor, being duly sworn, deposes and says that she is employed as a barmaid by the American Legion Post 173, at 4211 Maple Avenue, Dearborn, Michigan, which has a Club License.

Deponent further says that she has been a barmaid there for a period of over a year, and that the occupation of barmaid is her only means of livelihood.

Deponent further says that her only other employment was in a defense plant during the war; that she was dis-

charged from that work when she was replaced by a returned veteran; that she was out of work for several months until she found employment at the American Legion Bar, where she gradually learned the job of barmaid; and that she knows that it is a very difficult matter to obtain employment if one is inexperienced and has no special training, and that her only special training, outside of her work in the defense plant, is that of a barmaid.

Margaret Gregor.

Subscribed and sworn to before me this 1st day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 29] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF ANNA BELON

STATE OF MICHIGAN,
County of Wayne, ss:

Anna Belon, being duly sworn, deposes and says that she is employed as a barmaid in the Dearborn Cocktail Bar, located at 13736 Michigan Avenue, Dearborn, Michigan.

Deponent further says that she has been a barmaid for a period of two years, and that she learned the occupation of barmaid while she had been a waitress.

Deponent further says that since learning the occupation of barmaid, she has been able to earn sufficient moneys to support not only herself, but her mother as well, which she was unable to do while employed as a waitress.

Deponent further says that the occupation of barmaid is her only means of livelihood, as well as means of assistance in the support of her mother.

And further deponent saith not.

Anna Belon.

Subscribed and sworn to before me this 30th day of April, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 30] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF JULIA BABAK

STATE OF MICHIGAN,
County of Wayne, ss:

Julia Babak, being duly sworn, deposes and says that she is the owner of a bar, known as "Julia's Bar" located at 14526 West Warren Avenue in the City of Dearborn, and that she has been the owner of this bar since 1942.

Deponent further says that all of her life's savings were invested by her in this bar, and that the income she derives from said bar is her only means of support and livelihood.

Deponent further says that she employs a barmaid in her bar and works herself as a barmaid.

Deponent further says that if Section 19(a) of the Liquor Law which was added by Act No. 33 of the Public Acts of 1945, is enforced, this deponent will be forced to discharge her barmaid and will be compelled to hire two full-time bartenders because she will not be permitted by the law to act as a barmaid in her own establishment.

Deponent further says that the business is not sufficiently lucrative to make it possible for her to pay two full-time bartenders and still have anything left for herself for her support, and that she will thereupon be forced out of business, or be compelled to sell said business at a sacrifice.

[fol. 31] Deponent further says that neither she nor her barmaid has ever had any complaint against her in the operation of said bar.

Deponent further says that she had tried to employ male bartenders, but found it very unsatisfactory because the male bartenders she has had would drink upon the premises, and that she has not had any of this difficulty with a barmaid.

Deponent further says that in her experience in operating the bar, she has found that her customers generally prefer a barmaid rather than a bartender, and that most of her patrons are people living in the community, who come to the bar in family groups.

And further deponent saith not.

Julia Babak.

Subscribed and sworn to before me this 30th day of April, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF LORETTA NEPHEW

STATE OF MICHIGAN,
County of Wayne, ss:

Loretta Nephew, being duly sworn, deposes and says that she is a citizen of the United States and a citizen and resident of the City of Dearborn, State of Michigan, and resides at 5910 Kendall Avenue in the City of Dearborn.

Deponent further says that she is a barmaid employed in a duly licensed bar owned and operated by Joseph McEvoy, known as the Scenic Gardens, located at 14404 Ford Road, Dearborn, Michigan.

Deponent further says that she makes this affidavit in support of the application of the plaintiffs in the above entitled cause for a temporary injunction.

Deponent further says that she has been a barmaid and employed in this same bar for a period of 13½ years.

Deponent further says that she is married and living with her husband and family at the address above mentioned; that she has had eight children, seven of whom are now living, and that it became necessary for her to work in order to help maintain their home and properly support their children, and that she obtained employment at the Scenic Gardens bar in October, 1933, and has been employed there ever since.

[fol. 33] Deponent further says that it was absolutely essential for her to obtain employment at that time, and that it is still essential for her to keep her employment because she still helps maintain her household and two minor children who are still at home; that by her earnings it became possible for her and her husband to provide their children

with proper education, a good home, and some of the necessities of life which they otherwise would have been deprived of.

Deponent further says that the occupation of barmaid is the only occupation she knows, and that if she is forced to give up her employment, she will be unable to find other employment because of her age and her lack of knowledge of any other kind of work.

Deponent further says that her employer does not devote his entire time to the business of the bar, and that it has become the duty of this deponent to assume the responsibilities of management, as well as tending bar; that unless a temporary injunction is issued in the above entitled cause, deponent's employer will be compelled to discharge her, as the business will not warrant hiring her and in addition, another bartender.

And further deponent saith not.

Loretta Nephew.

Subscribed and sworn to before me this 30th day of April, A. D., 1947, Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 34] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF BABS BAUGH

STATE OF MICHIGAN,
County of Wayne, ss:

Babs Baugh, being duly sworn, deposes and says that she resides at 6954 Payne Avenue, Dearborn, Michigan, and that she is employed as a barmaid at West Warren Gardens, located at 13722 West Warren, Dearborn, Michigan, which is owned by Mrs. Sadie Gibbons and operated under a "Class C" license.

Deponent further says that she has been employed by Mrs. Gibbons for a period of three years, and prior to that time she had been a barmaid and a waitress.

Deponent further says that she supports herself and her 14-year-old son, and that from her experience as a waitress, she knows that she would not be able to earn enough money as a waitress to support herself and child; that she knows no other occupation other than barmaid or waitress, and that the only occupation at which she can earn enough money to support herself and child is that of a barmaid.

And further deponent saith not.

Babs Baugh.

Subscribed and sworn to before me this 5th day of May, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 35] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF BLANCHE SUROWIEC

STATE OF MICHIGAN,
County of Wayne, ss:

Blanche Surowiec, being duly sworn, deposes and says that she resides at 5415 Proctor Avenue in the City of Detroit, Michigan, and that she is employed as a barmaid at the Blackstone Bar located at 13214 Michigan Avenue, Dearborn, Michigan.

Deponent further says that she has been employed at the Blackstone Bar for the past 13½ years, and that she knows no other occupation than that of barmaid; and that the Blackstone Bar where she is employed is owned by her cousin.

Deponent further says that if her employer is compelled to discharge her, it will work a great hardship upon deponent, in view of the fact that she will be unable to obtain any other employment by reason of the fact that she has no training or experience in any other work.

And further deponent saith not.

Blanche Surowiec

Subscribed and sworn to before me this 5th day of May, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF SALLY THURE

STATE OF MICHIGAN,
County of Wayne, ss:

Sally Thure, being duly sworn, deposes and says that she is a resident and citizen of the United States, and resides at 4114 Calhoun, Dearborn, Michigan, and that she makes this affidavit in support of plaintiffs' application for interlocutory injunction in the above entitled cause.

Deponent further says that she is employed as a barmaid at the Maple Bar, located at 4025 Maple, Dearborn, Michigan, and has been so employed for a period of two years; and that she has been a barmaid for a period of four years.

Deponent further says that the occupation of barmaid is the only occupation she has ever had and that she has no training or experience in any other line of work; that she supports two children, 11 and 7 years of age, and it is necessary for her to work; that if her employer is compelled to discharge her, it will work a great hardship upon deponent, in view of the fact that she will be unable to obtain any other employment, by reason of the fact that she has no training or experience in any other work.

Sally Thure.

Subscribed and sworn to before me this 5th day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 37] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF IRENE SCOTT

STATE OF MICHIGAN,
County of Wayne, ss:

Irene Scott, being duly sworn, deposes and says that she lives at 4623 Bingham Avenue in the City of Dearborn, County of Wayne, State of Michigan, and that she is employed as a barmaid at the Poker Bar located at 13277 Michigan Avenue, Dearborn, and has been employed at the Poker Bar for a period of five years.

Deponent further says that she has been a barmaid for a period of six years, and knows no other occupation or trade.

Deponent further says that she is dependent upon her work to support herself, and that if her employer is compelled to discharge her, she would be unemployed and unable to obtain other employment because of her lack of training and experience in any other kind of work.

Deponent further says that she has never had any trouble or complaint of any kind whatsoever, either with the Liquor Control Commission, or with any of the patrons.

Irene Scott.

Subscribed and sworn to before me this 2nd day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 38] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF ZELDA LALONDE

STATE OF MICHIGAN,
County of Wayne, ss:

Zelda LaLonde, being duly sworn, deposes and says that she is a citizen of the United States, and resides at 5650

Neckel Avenue, Dearborn, Michigan, and that she makes this affidavit in support of the petition of the plaintiffs for an interlocutory injunction, being one of the persons on whose behalf the above entitled cause was instituted.

Deponent further says that she is employed as a barmaid at McMahon's Bar located at 5219 Schaefer Road, Dearborn, Michigan, and has been so employed for approximately five years.

Deponent further says that she is married and lives with her husband and three children; that previous to her employment at McMahon's Bar, she was a housewife and did not work outside her home; that the occupation of barmaid is the only work for which she is trained, and that she has no training or experience in any other kind of work.

Deponent further says that her husband is employed under Civil Service, and that it is necessary for this deponent to work in order to help support her three children and maintain the household, and that if her employer is compelled to discharge her, it will work a great hardship upon this deponent and her family, because she will be unable to find other employment by reason of her lack of training and experience in other work.

And further deponent saith not.

Zelda LaLonde.

Subscribed and sworn to before me this 5th day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 39] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF CONNIE CALLOWAY

STATE OF MICHIGAN,
County of Wayne, ss:

Connie Calloway, being duly sworn, deposes and says that she is a citizen of the United States and of the City of Dearborn, Michigan and resides at 5430 Horger Avenue in the City of Dearborn.

Deponent further says that she has been a barmaid since the Liquor Law was first adopted in the State of Michigan in 1933, and that she learned the occupation of barmaid and has been following that occupation ever since, and that she knows no other trade or occupation.

Deponent further says that she is employed as a part-time barmaid at "Julia's Bar" located in the City of Dearborn, and various other bars in the City of Dearborn, and that her occupation of barmaid is her only means of livelihood.

Deponent further says that she makes this affidavit in support of the application of the plaintiffs for interlocatory injunction restraining the defendants from enforcing Section 19(a) of the Liquor Law, which was added by Act 133 of the Public Acts of 1945.

Deponent further says that she will be irreparably injured and will be deprived of her property without due process of law, in view of the fact that her occupation and work as a barmaid is her only means of support, if defendants are permitted to enforce Section 19(a) of the Liquor Law.

And further deponent saith not.

Connie Calloway.

Subscribed and sworn to before me this 1st day of May, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 40] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF DOLORES DEROSIA

STATE OF MICHIGAN,
County of Wayne, ss:

Dolores DeRosia, being duly sworn, deposes and says that she is a citizen of the United States and a citizen of Dearborn, residing at 4720 Williamson, in the City of Dearborn, Michigan.

Deponent further says that she is employed at the Oriole Bar, located at 5055 Schaefer Road in the City of Dearborn, and has been employed as a barmaid at the Oriole Bar for a period of nine years, and that it is her only means of support.

Deponent further says that she has two children, and supported herself and both of her children out of her earnings for the past nine years, and that one of her children is now married; that her other child now makes his home with her, having just returned from three years' service overseas in the Marine Corps.

Deponent further says that the occupation of barmaid is the only one in which she has had any experience, and that if her employer is compelled to discharge her, she will be unemployed and unable to support herself and help support her son until he can re-establish himself.

Deponent further says that she makes this affidavit in support of plaintiff's application for interlocutory injunction, being one of the persons on whose behalf said suit was instituted.

Dolores DeRosia.

Subscribed and sworn to before me this 1st day of May, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 41] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF CAROLINE CURTIS

STATE OF MICHIGAN,
County of Wayne, ss:

Caroline Curtis, being duly sworn, deposes and says that she is a citizen of the United States and resides in the City of Dearborn, at 13350 Leonard.

Deponent further says that she is employed as a barmaid at the Mercury Bar in the City of Dearborn, located at

14216 Michigan Avenue, and that she has been a barmaid at said bar for a period of 12 years.

Deponent further says that she knows no other occupation, other than that of barmaid, and that it is her only means of support.

Deponent further says that if the law is enforced, her employer would be obliged to discharge her and that she would then be unemployed and unable to obtain other employment to support herself, in view of the fact that she is inexperienced in any other field of work.

Caroline Curtis.

Subscribed and sworn to before me this 1st day of December, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 42] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF CHARLOTTE MAXWELL

STATE OF MICHIGAN,
County of Wayne, ss:

Charlotte Maxwell, being duly sworn, deposes and says that she is a citizen of the United States and resides at 4550 Orchard Avenue in the City of Dearborn, County of Wayne, State of Michigan, and that she makes this affidavit in support of plaintiffs' application for an interlocutory injunction.

Deponent further says that she is a barmaid and is at the present time employed at Korte's Greenfield Inn, located at 15510 Michigan Avenue in the City of Dearborn.

Deponent further says that she has been a barmaid for a period of six years, and that her work as a barmaid is her only means of livelihood.

Deponent further says that she supports her husband, who is a returned veteran who is ill and under doctor's care so that he is unable to work in order to support either him-

self or this deponent; that she was compelled to pay out large sums of money recently for hospital and medical bills for her husband, who had to undergo an operation about a month ago.

Deponent further says that she knows no other occupation at which she can earn sufficient moneys with which to support herself and her husband, than that of barmaid, and that if she is discharged from her position she will suffer great and irreparable injury.

And further deponent saith not.

Charlotte Maxwell.

Subscribed and sworn to before me this 1st day of May, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 43] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF CLARA BRYANT

STATE OF MICHIGAN,
County of Wayne, ss:

Clara Bryant, being duly sworn, deposes and says that she is a citizen of the United States, and resides at 6517 Horatio Avenue, Detroit, Michigan.

Deponent further says that she is employed as a barmaid at the Midway Bar, located at 13254 Bingham Avenue, Dearborn, and that she has been a barmaid for a period of two and a half years at the said Midway Bar; and that she has been a barmaid for a period of ten years and upwards, and is not trained or experienced in any other occupation.

Deponent further says that she is married and living with her husband and two sons; that it became necessary for her to work because of the illness of her husband, and that her earnings supported the family during her husband's illness, and have helped support the family for many years; that if her employer is compelled to discharge her, she will be unemployed and unable to engage in any other employ-

ment because of lack of training and experience in any other work.

Deponent further says that she makes this affidavit in support of the application of the plaintiffs for interlocutory injunction.

Clara Bryant.

Subscribed and sworn to before me this 2nd day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 44] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF HAZEL SMITH

STATE OF MICHIGAN,
County of Wayne, ss:

Hazel Smith, being duly sworn, deposes and says that she is a citizen of the United States, and resides at 700 North Mildred Street, Dearborn, Michigan, and that she makes this affidavit in support of plaintiffs' application for an interlocutory injunction in the above entitled cause.

Deponent further says that she is employed as a barmaid at the Gem Bar located at 4822 Greenfield Road in the City of Dearborn, and has been so employed for a period of 4½ years; and that she has been a barmaid for approximately eight years.

Deponent further says that she is married and living with her husband, and that she has used her earnings to help pay for their *him*; that the occupation of barmaid is the only work in which deponent is experienced, and that if her employer is compelled to discharge her, she will be unemployed and unable to obtain other work by reason of lack of training and lack of experience in any other work.

And further deponent saith not.

Hazel Smith.

Subscribed and sworn to before me this 2nd day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 45] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF FANNIE DRAGOMIR

STATE OF MICHIGAN,
County of Wayne, ss:

Fannie Dragomir, being duly sworn, deposes and says that she is a citizen of the United States, and resides at 4711 Schlaff Avenue in the City of Dearborn, Michigan; that she is employed as a barmaid at Baja's Bar, located at 10155 Dix Avenue, Dearborn, and has been so employed for a period of almost a year.

Deponent further says that except for having worked in a war plant, deponent knows no other trade or occupation, except that of barmaid, and that if her employer were compelled to discharge her, it would work a great hardship upon deponent and she would be unemployed and unable to obtain other employment by reason of lack of training and experience in any other work.

Deponent further says that she makes this affidavit in support of plaintiffs' application for interlocutory injunction, being one of the persons in whose behalf said suit was instituted.

Fannie Dragomir.

Subscribed and sworn to before me this 2nd day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 46] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF CAROLINE HAYNOR

STATE OF MICHIGAN,
County of Wayne, ss:

Caroline Haynor, being duly sworn, deposes and says that she resides at 9982 Schaefer Road, Dearborn, Michigan, and

that she is employed as a barmaid at the DeLuxe Bar located at 13839 Michigan Avenue, Dearborn, Michigan, and has been so employed for a period of six years.

Deponent further says that she has been a barmaid for a period of ten years, and has had no experience at any other kind of work or occupation; and that if her employer were compelled to discharge her, she would be unemployed, and by reason of her age, would be unable to obtain other employment.

Deponent further says that she is dependent upon her occupation as a barmaid, to support herself.

And further deponent saith not.

Caroline Haynor.

Subscribed and sworn to before me this 2nd day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 47] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF MARY NEUMAN

STATE OF MICHIGAN,
County of Wayne, ss:

Mary Neuman, being duly sworn, deposes and says that she resides at 1902 Wyoming Avenue, Dearborn, Michigan; and that she is employed as a barmaid at Stanley's Bar, located at 10319 Dix Road, Dearborn, and has been so employed for a period of the past three years.

Deponent further says that she has been employed as a barmaid since 1937; that the occupation of barmaid is the only work she has ever done; that she has no training or experience in any other type of work.

Deponent further says that her income derived from her earnings as a barmaid helps support her husband who has suffered a broken arm; and that when her husband is able to work, his earnings are not sufficient to maintain their home; that if she is discharged from her present work by

reason of the enforcement of the Liquor Law, it will work a great hardship upon her and she will be without employment and unable to obtain other employment because of lack of training and experience in any other work.

Mary Neuman.

Subscribed and sworn to before me this 2nd day of May, A. D. 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 48] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF ELLA SCHMIDT

STATE OF MICHIGAN,
County of Wayne, ss:

Ella Schmidt, being duly sworn, deposes and says that she resides at 8252 Carlin Avenue, Detroit, and is employed as a barmaid at Gayton's Bar, located at 7651 Schaefer Avenue in the City of Dearborn, Michigan, and has been so employed for a period of six years.

Deponent further says that she has been a barmaid for nine years; and that she has had no training or experience in any other work; that if her employer should be compelled to discharge her, she will be unable to find any other employment, by reason of lack of training and experience in other work, and that she would be unemployed.

Deponent further says that she and her husband are buying their home and her earnings are used to help meet the payments on this property; that if she has to be discharged, she and her husband would be unable to meet the payments, which might result in the loss of their property and savings.

Ella Schmidt.

Subscribed and sworn to before me this 2nd day of May, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 49] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

[Title omitted]

AFFIDAVIT OF MARGARET KAISER

STATE OF MICHIGAN,
County of Wayne, ss:

Margaret Kaiser, being duly sworn, deposes and says that she resides at 7631 Maple Avenue, Dearborn, Michigan; and that she is employed as a barmaid at Gayton's Bar, located at 7651 Schaefer Road, Dearborn; and has been so employed for the past seven years.

Deponent further says that prior to her employment at Gayton's Bar, she had been a housewife for 16 years; that following her husband's death, she was compelled to seek employment and was able to find employment at Gayton's Bar, where she learned the job of barmaid.

Deponent further says that she needs this employment to support herself and that at her age it would be impossible for her to learn any other employment at which she can support herself.

And further deponent saith not.

Margaret Kaiser.

Subscribed and sworn to before me this 2nd day of May, A. D., 1947. Nell M. Yorgen, Notary Public, Wayne County, Michigan. My commission expires December 9, 1949.

[fol. 50] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 6618

VALENTINE GOESAERT and MARGARET GOESAERT, Plaintiffs,

vs.

OWEN J. CLEARY, FELIX H. H. FLYNN and G. MENNEN WILLIAMS, Members of the Liquor Control Commission of the State of Michigan, Defendants

Civil Action No. 6619

GERTRUDE NADROSKI and CAROLINE McMAHON, Plaintiffs,

vs.

OWEN J. CLEARY, FELIX H. H. FLYNN and G. MENNEN WILLIAMS, Members of the Liquor Control Commission of the State of Michigan, Defendants

TRANSCRIPT OF PROCEEDINGS—Filed December 31, 1947

Proceedings had in the above entitled causes before the Honorable Charles C. Simons, Circuit Judge, and the Honorable Frank A. Picard and the Honorable Theodore Levin, District Judges, at Detroit, Michigan, on Tuesday, September 9, 1947.

Messrs. Davidow and Davidow, by Miss Anne R. Davidow, Appearing on behalf of the Plaintiffs.

Mr. Charles M. A. Martin, Appearing on behalf of the Defendants.

COLLOQUY

Judge Simons: Will the clerk call the case that has been set for this time?

The Clerk: Valentine Goesaert and Margaret Goesaert vs. Owen J. Cleary and others; Gertrude Nadroski and Caroline McMahon vs. Owen J. Cleary and others.

Miss Davidow: Plaintiffs are ready, your Honor.

Judge Simons: Very well. Is the respondent here?

Mr. Martin: Here, your Honor, ready.

[fol. 51] Judge Simons: I understand this is a petition for a temporary injunction to restrain the enforcement of a state statute. There is no dispute as to the facts?

Miss Davidow: That, your Honor please, we do not know, whether there will be any dispute as to the facts we have alleged in our complaint. No answer has been filed because the respondent has filed a motion to dismiss, so that the matter before the court now is still on the original and amended application on the part of the plaintiffs so that we don't know whether any of the allegations of fact are going to be denied. As a matter of law, however, I think the court will take judicial notice that where there is a motion to dismiss the allegations of fact contained in the complaints will be accepted as true, so that we would start out——

Judge Simons: What I had in mind was this: If there is no question of fact that is in controversy and it is merely a question of law, whether it may not be stipulated that this hearing is both on the petition for temporary injunction and permanent injunction so that the whole matter could be disposed of at this hearing.

Miss Davidow: I think, if your Honor please, that so far as the law is concerned, yes; but insofar as the facts, that would depend upon whether or not they concede the facts in an answer which they would subsequently file if their motion to dismiss is denied.

Judge Simons: Is the State prepared with an answer?

Mr. Martin: We have no such answer prepared, your Honor, although I am willing to stipulate that the facts are as alleged in both bills of complaint and we have before this court merely a question of law. In other words, we admit their particular capacity to sue and theory on which suit was instituted.

Judge Simons: So there would be no difference in procedure either on the petition for temporary and the prayer for permanent injunction?

Mr. Martin: That is correct, your Honor.

Judge Simons: And the whole matter can be disposed of at this hearing?

[fol. 52] Mr. Martin: Absolutely.

Judge Simons: You agree to that?

Miss Davidow: Yes, your Honor, under those circumstances.

Judge Simons: All right. Proceed for the plaintiffs.

Miss Davidow: If your Honors please, this is a petition on behalf of the several plaintiffs in both suits against the Liquor Control Commission for an injunction.

At this time, if your Honors please, I wish to present into the record of this case twenty-four affidavits which have been executed by various of the people on behalf of whom this action was taken. They are both barmaids and bar owners. We set forth somewhat in detail the reasons why they believe the law is unconstitutional.

Insofar as the facts are concerned and how it would affect them, may I first, if your Honors please, read this particular section which was added by Act No. 133, Public Acts 1945, which affects these plaintiffs, which licenses bartenders and gives the commission the right to adopt rules for governing the licensing of bartenders, and goes on to say:

> "Each applicant for license shall be a male person 21 years of age or over, shall submit a certificate from his local board of health or health officer showing that such person is not affected with any infectious or communicable disease, and shall meet the requirements of the commission: Provided, That the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish."

And then it goes on to say the license may be revoked, and so on.

Then it winds up with:

> "For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar."

[fol. 53] Now, of course, the question arises why that restriction? Why the restriction to only male persons of the age of 21 years or over, and taking out of that restriction the wife or daughter of a male owner. Now, mind you, that would automatically eliminate a woman owner who happens to be one of the plaintiffs in these cases. It would eliminate the daughter of a female owner from acting as a

barmaid in her mother's establishment; and prohibit a woman owner from being a barmaid in her own establishment; and prohibit her from hiring any woman bartender.

Under the law what is a bartender? A bartender is a person who mixes and pours alcoholic drinks behind a bar. In other words, they could mix and pour them on the table; they could mix and pour them in front of the bar; they could mix and pour them in the kitchen; they could mix and pour them anywhere else and it wouldn't come under the definition of the law of a bartender. But if they happen to mix and pour alcoholic beverages behind the bar, automatically they are bartenders under the law; and a woman cannot get a license.

Now, the women don't complain about the fact the license is required of the bartender. Everyone of the plaintiffs whom I represent would be perfectly willing, and have offered themselves in some of the places in Dearborn to file application and obtain a license. Personally, I think licensing of bartenders is a good thing. But once you license bartenders, then these plaintiffs contend that all persons within that classification must be treated alike, and there is no reason for any distinction between male and female, or the woman bartender whose husband or father happens to be an owner, but the other one being barred.

Judge Picard: May I ask a question? Have they construed the law as meaning that the woman who has a license can't be a bartender?

Miss Davidow: That remains a question, your Honor please. We don't know whether they have construed that or not. In the one case that has come up in the Michigan Supreme Court——

Judge Picard: I don't mean that, I mean the Liquor Control Commission itself.

[fol. 54] Miss Davidow: Yes.

Judge Picard: Has the Liquor Control Commission held that the wife of a male owner or his daughter can be a bartender but a woman that owns it cannot? Have they already done that?

Miss Davidow: Yes, your Honor.

Judge Picard: All right.

Miss Davidow: Now, in our trial brief that we filed along in May, at the time we thought this matter was first going to be argued, we set forth a number of decisions which we believe are applicable to the facts in the case at bar.

One of the questions that the respondent may raise and which we have partially covered in our brief is the fact that the matters in controversy here are res judicata by reason of the Michigan Supreme Court case of Fitzgerald vs. Liquor Control Commission, which was decided by the Michigan Supreme Court last April. I have obtained a copy of the printed record on appeal in that case and I have gone through it very, very carefully and I fail to find anywhere in that complaint, filed by the plaintiffs in that case where the question of repugnancy of the law to the federal Constitution was raised. Now, from this record the bill of complaint was filed attacking the law as unconstitutional, so far as the Michigan Constitution was concerned.

Judge Simons: Were these plaintiffs——

Miss Davidow: No, these plaintiffs had nothing to do with that action. The two plaintiffs in this case were women barmaids in the city of Detroit, not known, and having nothing to do with these plaintiffs whom I represent, who are in Dearborn.

Judge Simons: Then there is no question of res judicata where there are different plaintiffs. The decision may be persuasive on this court but doesn't bind us on the federal constitutional question.

Miss Davidow: That is what I wanted to make sure of. I was ready to argue that question.

[fol. 55] On the question of res judicata, I would like to call your Honors' attention to a very late Michigan Supreme Court case, which came out in the advance sheets in July of this year, touching upon the question of res judicata —the case of Stevenson v. Brotherhoods Mutual Benefit, 317 Mich. 575, wherein the Michigan Supreme Court held even where the court itself passes upon, or apparently passes upon the question of fact and makes a decision, if that question of fact was not actually before the court, that is not res judicata in other decision.

Judge Picard: You mean by continuity?

Miss Davidow: That is right. And that was a case wherein there actually was a trial on the merits and it went up to the Supreme Court on appeal from a trial on the merits.

Judge Picard: What was the other case?

Miss Davidow: This Michigan Supreme Court case?

Judge Picard: Yes.

Miss Davidow: That was a case in which two women bartenders in Detroit filed a suit in chancery to obtain injunction against the Liquor Control Commission, declaring this particular act in reference to the classification was unconstitutional, repugnant to the Michigan Constitution. That was decided on a motion to dismiss. No testimony was taken. Just the respondent filed a motion to dismiss and the matter was argued and went up to the Supreme Court on the affirmance of the motion to dismiss.

Judge Picard: Those were two women, they were not the owners?

Miss Davidow: They were not the owners.

Judge Picard: In this case——

Miss Davidow: In this case one of the plaintiffs——

Judge Picard: —Goesaert is an owner and the other——

Miss Davidow: —is her daughter. And the other case one is an owner. There are two plaintiffs in each case. In one case we have a woman owner and her daughter who was a bartender, both being bartenders. In the other we have a woman owner and woman barmaid, both of them being also barmaids. We also represen- other plaintiffs, as the [fol. 56] affidavits will show, both owners and barmaids, and in most cases where women are the owners, their bartenders are women and women barmaids. In other words, women owners like to have women barmaids in their places of employment.

The practical situation, of course, is this, if the court please: These women, particularly who are owners, are licensed by the State Liquor Control Commission to operate an establishment according to the class which they have qualified for under the law. They will not be permitted to act as barmaids in their own establishment, but, as I said before, as far as the classification is concerned they could serve. The law doesn't say anything about serving, merely mixing or pouring. They will not be permitted to mix or pour liquors behind the bar. If they bring it out in front of the bar I can't see any reason why they wouldn't be able to do that. Nevertheless, I am showing that to the court because it seems so utterly absurd to make such a classification for which there is no earthly reason.

Insofar as checking back on the law in the days before Women's Suffrage when women were protected and wanted that protection, well then, yes, possibly women might have

needed that protection of being presented from being in a bar. But here the law absolutely gives the right to some women to be able to mix our pour drinks behind a bar.

Judge Simons: Your question boils down to this then, doesn't it, Miss Davidow? Is this distinction between barmaids who are the wives or daughters of male owners, and those who are the wives or daughters of female owners, is that such an arbitrary, unreasonable classification as to fall within the condemnation of the Fourteenth Amendment?

Miss Davidow: Yes, your Honor, that covers one of the points.

The other point is where women owners, or women who are not owners but are bartenders, will be prevented from obtaining a license and engaging in their occupation because they happen to be women and don't happen to come within the exception which covers the wife of a male owner——

[fol. 57] Judge Simons: You mean this statute prevents a woman owner from acting as her own bartender?

Miss Davidow: That is right, your Honor.

Judge Picard: Has the Liquor Control Commission also construed the last paragraph of that section, "a person who mixes or pours alcoholic liquor behind a bar," has it construed that if the woman who owns the bar got out in front and mixed the drink she wouldn't violate the act, or is that your construction?

Miss Davidow: That is my construction.

Judge Picard: I see.

Miss Davidow: They might construe it otherwise, but certainly that isn't the way the law reads. And the law doesn't say anything about serving liquor. In other words, a woman could be employed as a waitress in a bar and after the drink is given her over the bar she could serve it, or take it directly from the kitchen and serve it. There is nothing to prevent a woman from serving liquor, and what is there between mixing and serving that makes the mixing of a drink something that women may not do? What makes it something that is only the prerogative of the male? A woman can serve it but she can't mix or pour it behind a bar.

Judge Picard: Of course, if they put in that she couldn't serve, you couldn't have any of the restaurants downstairs in the Book, Fort Shelby, or any place.

Miss Davidow: That is right. You wouldn't have any waitresses at all. But there is that distinction for which there is no sensible, logical or reasonable conclusion or reason.

Judge Simons: That is merely your assertion.

Miss Davidow: That is right, your Honor.

Judge Simons: Is it within the province of this court to say it is incompetent for the legislature to take the view that the serving of liquors in a barroom is ordinarily attended with certain hazards, and that it might enact provisions which would prevent that situation in any place where there wasn't a male person looking after the preservation of order?

[fol. 58] Now, where the bartender is a daughter or a wife of a male owner is one classification that the statute makes. And where the daughter who acts as a bartender is the daughter of a female owner there is no opportunity for some male to be present upon the premises who could preserve order. Is that an unreasonable distinction?

Miss Davidow: I think so at the present time, if your Honor please, for this reason: The Michigan Liquor Control Commission has been given very wide powers to regulate in every phase the sale and traffic of liquor. I think that the Liquor Control Commission has adequate means at its disposal to supervise——

Judge Simons: Isn't that begging the question, Miss Davidow? You are asking this court to say that a precaution that the state legislature thinks is necessary in this particular type of business is so palpably and obviously unreasonable and arbitrary that a court ought to interfere.

Miss Davidow: Yes, your Honor, for this reason: The law doesn't say that a bartender covers the serving of liquor. The law merely says a bartender is "a person who mixes or pours alcoholic liquor behind a bar." It says absolutely nothing about serving liquor.

Judge Simons: I don't think you got the point of my query at all.

Miss Davidow: I think I did, your Honor.

Judge Simons: Certainly you don't urge that there is any arbitrary distinction in requiring that somebody in authority around the premises should be able physically to preserve order, and that a male would be more apt to be able to do that than a female. Now, if the legislature

feels that somebody in authority about the premises where liquor is served, either the owner or his bartender, should be a male, that would be an unreasonable qualification?

Miss Davidow: Yes, your Honor, I think it would in view of the fact that the law itself doesn't limit owners to males at all. The law gives every person, male and female, the right to be an owner if they come within certain prescribed rules.

Judge Simons: Yes, but where there is a female owner the law prevents the employment of a female bartender.

[fol. 59] Miss Davidow: And prevents the owner herself from being a barmaid in her own establishment.

Judge Simons: All right.

Miss Davidow: Now, if your Honors please, I want to call your attention to the language used——

Judge Picard: May I ask you a question before you get to that? Wasn't the purpose of this legislation to stop all women from being behind the bar at all? Wasn't that the first act that was put in, to stop women from being behind the bar?

Miss Davidow: That is as I understand it. I may not have the story correctly, but the story that has been told me is this: What actually happened is the fact the Bartenders' Union, which doesn't admit women to membership, lobbied for this bill to prevent women from being employed as barmaids so they would then have all of these jobs that would be left open to the bartenders. Now, once the bartenders are in there, under their union rules, the owner would never again be able to have a barmaid because they would have to employ only union labor and the Bartenders' Union will not permit women to be members of the union.

Judge Picard: Wasn't this act amended? The bill that was put in, wasn't that an amendment?

Miss Davidow: No, your Honor. As I understand it, originally it was a regulation of the Liquor Control Commission which was withdrawn and then subsequently this law was enacted.

Judge Simons: To get back to our particular province here, sitting as a District Court of the United States, to interfere with the operation of a Michigan statute, the burden is upon you to show that this classification is so palpably arbitrary and unreasonable as to offend against

the guaranties of the Federal Constitution. That is our question.

Miss Davidow: Yes, your Honor.

Judge Simons: Now, if the court is able to perceive that there is some reasonable ground for making this classification, aren't our hands then tied so far as interfering with the operation of the state law?

[fol. 60] Miss Davidow: If the law had put all women in the same class and had barred them from serving liquor, then I think your Honor would be right.

Judge Simons: Well, so far we are agreed.

Miss Davidow: Yes. But where they make the criterion the mixing or pouring of drinks behind a bar, then I think they have limited the classification to such a point that it is unjust classification insofar as all women are concerned.

Judge Simons: We are not considering whether it is insufficient classification.

Miss Davidow: I mean illegal and repugnant to the Constitution.

May I read from the case of——

This is contained in 69 Law Ed. on page 623, quoting from Mr. Justice Brandeis' opinion wherein he said:

> "The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner."

That, if your Honors please, is my contention so far as this law is concerned in making it legal for some and illegal for others, and the classification is the small classification of those who mix and pour drinks behind the bar.

May I call your Honors' attention to a case decided in Florida by the Florida Supreme Court, covering an ordinance of the city of Miami? This was handed down April 18, 1947, wherein this barmaid obtained an injunction against the application of an ordinance which was a similar

ordinance to the state law here, and Justice Adams of the Supreme Court of Florida held:

> "This ordinance recognizes women may frequent bars and engage in every practice as men, save and except that they shall not serve liquor by the drink [fol. 61] over the bar, notwithstanding they may mix and serve it otherwise. A municipality only has power to enact reasonable ordinances."
>
> The court held: "We can see no sound reason in law to sustain the ordinance and we hold it void."

In that case they even went farther than the Michigan law does in barring women from serving. Now, we don't have that provision in the Michigan law at all. They are not barred from serving but they are barred from mixing or pouring it. In other words, they could say behind the bar provided somebody else mixed and poured it; and they could serve it behind the bar because the law doesn't cover the serving of liquor at all.

Judge Simons: You have some other point?

Miss Davidow: That covers the main points. The others I think are covered adequately in our trial brief, the question of jurisdiction, and covering all the different classifications we have set up. I don't think it would be advisable to take up the time of this court in a repetition of what we have already covered in our trial brief.

Judge Picard: You question the jurisdiction?

Miss Davidow: No, your Honor. I say this Court has jurisdiction.

Judge Picard: Do they question it?

Miss Davidow: That I don't know. That is the reason I covered it.

Then, if your Honors please, I don't know whether you would want me at this time to read any of these affidavits in support of the application showing what the hardship would be to barmaids unless the injunction is issued.

Judge Simons: We are not concerned with the wisdom of this legislation at all. We are only concerned with its constitutional validity, and whether its enactment is repugnant to the Federal constitution.

Miss Davidow: These affidavits show, as far as the barmaids are concerned, the establishments in which they work. Your Honor mentioned the possibility of a valid reason

for the legislature to act; that is covered by these affidavits, insofar as what happens in bars where the women serve.

[fol. 62] Judge Simons: Of course, as individuals, if we were considering the wisdom of this classification, we might not be able to see it. But that isn't the test that we have got to apply. Our test is: Is this classification so palpably unreasonable that a court ought to strike it down as repugnant to the Federal Constitution?

Miss Davidow: Yes.

Judge Simons: We are agreed on that?

Miss Davidow: Yes, Your Honor.

I wish also to call your Honors' attention to that case decided by the Circuit Court of Appeals last spring in which the Circuit Court of Appeals also brought out the fact that once the law has made it possible for people to engage in either the sale of liquor or the owning of an establishment, then the law must be applied equally to all persons within that class. That one class can't be singled out of another one.

Judge Simons: The difference between that case and yours is this, isn't it: That there there was the allegation in the pleadings that the state authorities discriminated between individuals of the same class. Here there is no such contention. The contention is that the class which the state erected by this legislation is an arbitrary and unreasonable classification.

Miss Davidow: That is right, your Honor, but the reasoning, I think, follows along the same lines.

Judge Picard: Don't you also claim they have by this act discriminated against people of the same class? That is, if I am a woman owner my daughter can't serve, but if I am a male owner my daughter can?

Miss Davidow: Yes. We have set that up in our pleadings and covered it in the brief that they are discriminating against people in the same class. A woman owner may not be a bartender in her own bar; a male owner may. A daughter of a woman owner may not be, but a daughter of a male owner may be. And insofar as this situation where a man and his wife both are owners, there, of course, we don't know what the Liquor Control Commission [fol. 63] is going to do about that. Is the wife, being also a part owner, going to be given a license, and the daughter a license, or is that going to be considered a joint ownership of husband and wife making both wife and daughter

ineligible? We don't know; but that is another question that is going to come up to show people in the same class are being discriminated against.

Judge Simons: Let's hear from the respondent.

ARGUMENT ON BEHALF OF DEFENDANTS

Mr. Martin: Am I correct in my assumption you have been served with a copy of the State's brief, filed in Fitzgerald vs. Liquor Control Commission, by the State Liquor Control Commission?

Judge Picard: They say I have it. I haven't read it.

Mr. Martin: In reference to the case that plaintiffs' counsel has cited, decided by the Supreme Court of Florida, I wish to call the court's attention to an earlier case reaching the opposite conclusion and followed——

Judge Simons: Are we very intimately concerned with that? That was a question arising under Florida law.

Mr. Martin: That is correct. I was about to call your Honors' attention, I think this court should be guided by the interpretation of the particular statute as passed upon by the highest court in this state, that is the State Supreme Court.

Judge Simons: If we were concerned only with questions of Michigan law, that would be so. We are here concerned with the validity of this legislation as being repugnant to a provision of the Federal Constitution. That is our question. We are not here concerned with whether the state, in applying state law, acted soundly or not.

Mr. Martin: Those same questions which are now before this court were raised and briefed in the case decided by our Michigan Supreme Court.

Judge Simons: As to the reasonableness of the classification?

Mr. Martin: That is correct, your Honor.

Judge Simons: All right.

Mr. Martin: Insofar as the local law is concerned, our Supreme Court in that case followed the earlier Florida case.

[fol. 64] Judge Picard: The question there was not, as I understand it, the discrimination made between a woman owner of a bar and a man owner?

Mr. Martin: That is correct.

Judge Picard: Or the children of a woman owner and the children of a man. The Supreme Court of Michigan hasn't passed on that, has it?

Mr. Martin: No, your Honor. The only case upon which an interpretation of the Michigan court was passed is that of Fitzpatrick, which was instituted by two female bartenders, who were not female owners of licensed establishments. That is the only case that has been passed upon.

I wish to direct the court's attention to the case of People vs. Jemnez, a California case which the appellate department decided on January 27, 1942, as reported in 121 Pac. (2nd) at page 543.

Judge Picard: Will you give us the citation again?

Mr. Martin: I haven't the official, your Honor, but it may be found in 121 Pacific (2d) at page 543. It is also cited in our brief in the Fitzpatrick case, your Honor,

The plaintiff was charged with mixing the alcoholic beverages at an on-sale licensee's place of business, in violation of the Alcoholic Beverage Control Act. From an order dismissing the action the People appealed, and the original order dismissing the defendant was reversed.

> "Defendant, a woman who was neither an on-sale licensee nor the wife of a man who held an on-sale license, was charged with mixing alcoholic beverages at an on-sale licensee's place of business, in violation of" a California statute. That section provided as follows:
>
> "Every person who uses the services of a female in mixing alcoholic beverages * * * on any premises used for the sale of alcoholic beverages for consumption on the premises, or any female who renders such services on such premises, is guilty of a misdemeanor. * * *.
>
> "The provisions of this section shall not apply to the mixing of alcoholic beverages * * * by any on-sale [fol. 65] licensee nor to the mixing of such beverages by the wife of any licensee on the premises for which her husband holds an on-sale license.'"

Admittedly, if the court please, I have not been able to find in my search a case directly in point where such a privilege was denied to an on-sale female licensee, but this is the closest one that my search has revealed.

Judge Picard: Doesn't the law in that case supposedly give the right to a woman, who is a licensee, to serve?

Mr. Martin: That is correct. In our case, under our construction of the Michigan statute, that point of view to a female licensee is denied.

Judge Picard: In that case it doesn't give the right to the daughter of a male licensee and keep it away from the daughter of a female licensee, does it?

Mr. Martin: No, your Honor. It must be borne in mind, if the Court please, that here we are dealing basically with the exercise of the State's police power. As Judge Simons stated, unless it can be shown to this court that the particular classification is so unreasonable in fact and law as to be repugnant to the Constitution of the United States, particularly the Fourteenth Amendment, then the legislation must be sustained.

Now, in the Glicker case to which you referred a moment ago, if the court please, the Circuit Court of Appeals for this circuit held that there was no inherent right in any individual to a liquor license issued by the licensing authority—here the Michigan Liquor Control Commission—and that to deny a person such a license was not an infringement of the privileges and immunities clause of the Fourteenth Amendment. So I think, in view of the opinion there expressed, that we are limited here—if the plaintiffs are entitled to any redress it must be under the equal protection clause of the Fourteenth Amendment.

[fol. 66] In the case of Mayor of Hoboken vs. Louis Goodman, reported in 68 N. J. L. at 217, the statute forbad any female not having a license permitted by law to sell, offer, procure, furnish or distribute in any such place any such liquors or drinks, but provided that nothing therein shall be so constructed as to prevent the wife of any person having such a license from selling or distributing the aforesaid liquors. In other words, it extended the privilege to a wife of a male owner, just as it does in our particular Michigan statute, although the Michigan statute extends it one degree further, namely, to the daughter of a male owner, yet denies it at least by innuendo when it says, "No person (except the wife or daughter of a male owner) shall act as bartender," and excludes a licensee which was not before the court here.

Judge Picard: Does that exclude the owner?

Mr. Martin: It does not.

Judge Picard: If she is a licensee, does that exclude her?

Mr. Martin: It does not exclude a female licensee.

Judge Picard: Michigan seems to be the only state, as far as you can find?

Mr. Martin: As far as I have been able to find, that is correct, your Honor.

Judge Picard: Is there anything on the history of this legislation in the Journal Reports down at Lansing?

Mr. Martin: Yes. I haven't them here but I can refer them to you, and I think they are reasonably accurate. House Bill 398, introduced in the 1945 session of the Michigan Legislature, sought to extend the privilege to female owners but was prohibited by the amendment now before the court. That bill died in committee?

Judge Picard: Tried to extend it to what? I didn't get that.

Mr. Martin: To extend the privilege of tending bar to female licensees, to female owner-proprietors, if the court please, to holders of a license to dispense alcoholic liquor.

Judge Picard: That was killed?

Mr. Martin: That was killed in committee, if the court please.

[fol. 67] There was another attempt under House Bill 103, which was an attempt to repeal the entire section now known as 19-A which is before the court in this matter. That also died in committee, if the court please.

There was one other measure known as House Bill 89, which if adopted would have empowered the Commission, or at least permitted the Commission to license all female bartenders, irrespective of their relationship, whether they are licensees, or daughter or wife of a male owner. Those three measures, if the court please, failed of passage.

Judge Levin: The last incident was subsequent to filing of the bills in these cases?

Mr. Martin: I do not have the exact dates, your Honor please. I can obtain them and would be glad to submit them in connection with a brief if the court so requests.

Judge Picard: Do you think the legislature today, in view of the holiday death record of automobiles, could pass a law that the owner of a car, if he was a male, his daughter or his wife, could drive a car; but if she was a female she

couldn't drive it, she would have to have a male driver? Do you think that would be reasonable?

Mr. Martin: I wouldn't go that far, your Honor.

Judge Picard: Whether you go or not, do you think that would be valid?

Mr. Martin: I think the legislation is entirely different. There is no analogy, to my thinking on it.

Judge Picard: There might not be. I don't say there is. I just asked the question.

Mr. Martin: I say this: Here we are dealing with legislation in a very dangerous business which affects the public health, safety and morals of the community.

Judge Picard: What about the health and safety of the public in connection with automobiles? How many people were killed over the holidays? How many were killed directly as a result of liquor over the holidays?

[fol. 68] Mr. Martin: I couldn't answer that; I don't know.

Judge Simons: Have you anything further?

Mr. Martin: I don't believe so, your Honor please. I think, as Judge Simons says, the wisdom of the legislation is for the legislature to determine, unless it can be established that it is an unreasonable classification, why, I think it should be sustained.

I don't know the citations that counsel has cited in her brief. I don't seem to have a copy of it.

Miss Davidow: We didn't get a copy of yours either.

Judge Simons: Anything you want to add?

Miss Davidow: Yes. May I call your attention to the citations of counsel? They go upon the basis of dispensing liquors. Now, we want to keep in mind in our law here it isn't dispensing liquors, it isn't serving liquors—that might leave room for argument insofar as morality is concerned. This is mixing and pouring drinks. The law limits it to that, and the law expressly says only wives and daughters of male owners. So it can't be by innuendo—there is no innuendo about it. The law expressly stated on that point.

In closing may I call your Honors' attention to this case of Liggett Co. v. Baldridge, 278 U. S. 105, reported in 75 Law Ed. 204, where the constitutionality of an act of the Pennsylvania legislature was brought before the court. The act provided: "Every pharmacy or drug store shall be owned only by a licensed pharmacist," and in the cases of

corporations, associations and copartnerships required that all the partners or members thereof be licensed pharmacists, with the exception that such corporations, associations or partnerships already organized "may continue to own and conduct the same."

The matter came up before a court of three judges, and originally denied the preliminary injunction and dismissed the bill of complaint. The question went to the United States Supreme Court and the Supreme Court held:

> "The act under review does not deal with any of the things covered by the prior statutes above enumerated. [fol. 69] It deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

Now, in the case at bar we think that that covers it because we do have, we think, an unreasonable restriction. Women owners are licensed by the State Liquor Control Commission. There isn't anything in the law which prohibits a woman from being an owner, but the law does say even though a woman may own and operate a bar, she may not be a bartender. In other words, she may not mix or pour alcoholic liquors behind her own bar. It also says a man owner's wife and daughter may pour and mix liquor, but the woman owner whose daughter works for her may not do so.

Mind you, the law doesn't say a man must be on the premises at all times. In other words, a man may own a bar and be working elsewhere. His wife may be in charge of it and running it, and she would have a perfect right to do that. But the woman owner who has all her life's savings invested in a bar, licensed by the State, may not act as barmaid in her own bar.

Now, if the court please, it seems to me such classification is arbitrary, and certainly not based upon any fact or any conclusion that could be reasonably construed.

Judge Simons: Now, do we have all of the briefs?

Miss Davidow: You have our brief, if your Honor please.

Mr. Martin: If the court please, as I advised the court

already, I was recently assigned to argue this matter and I am not familiar with what has been presented to the court. Am I correct in assuming each of you members have a copy of our brief filed in the Fitzpatrick case?

Judge Levin: That is 316 Michigan?

Mr. Martin: That is right.

[fol. 70] Judge Simons: We have those briefs. Is there anything you want to add?

Mr. Martin: I would like an opportunity to reply to the brief counsel for plaintiffs has submitted.

Judge Simons: Can you do that promptly?

Mr. Martin: What time would the court permit me?

Judge Simons: Have you received a copy?

Mr. Martin: No, I haven't.

Judge Simons: Will you furnish him with a copy?

Miss Davidow: Yes, I can give him a copy right now. I have a copy.

Judge Simons: Can you give us your response to that in a short time?

Mr. Martin: If the court sets a date I will do the best I can to have it at that time.

Judge Simons: Within a week. You know what the issues are now. It ought not take very long.

Mr. Martin: It is just a question of time, your Honor, if I have to compile it myself.

Judge Simons: Do it as promptly as you can because we don't like these cases to drag.

Mr. Martin: Yes. I will do that.

Judge Simons: Very well.

Miss Davidow: In the meantime our temporary injunction continues?

Judge Simons: It will continue until the decision of the court is announced.

Miss Davidow: Thank you.

Judge Simons: The case is submitted. The court will now adjourn.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 71] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 6618

VALENTINE GOESAERT, et al., Plaintiffs

vs.

OWEN J. CLEARY, et al., Defendants

Civil Action No. 6619

GERTRUDE NADROSKI, et al., Plaintiffs,

vs.

OWEN J. CLEARY, et al., Defendants.

OPINION—Filed November 20, 1947

Before: Charles C. Simons, Circuit Judge; Frank A. Picard, Theodore Levin, District Judges.

LEVIN J.:

These cases, brought as class actions under Rule 23 of the Federal Rules of Civil Procedure, were consolidated and are now before this Court of Three Judges, convened pursuant to Judicial Code Sec. 266 as amended, on an application for an interlocutory injunction to restrain the enforcement of a law of the State of Michigan enacted by the Legislature on April 30, 1945, known as Act 133 of the Public Acts of 1945, Mich. Stat. Ann. Sec. 18.990 (1).

The complete act is set out in the margin hereof. The pertinent portion of the legislation which the plaintiffs urge in their suits as being violative of the Fourteenth Amendment to the Constitution of the United States, in that it denies them the equal protection of the laws and deprives them of their property without due process of law, may be summarized as follows: That in any city now or hereafter having a population of 50,000 or more, no female shall be licensed as a bartender (a bartender being described as [fol. 72] a person who mixes or pours alcoholic liquor behind the bar), unless such person be the wife or daughter of the male owner of the licensed liquor establishment.

In the Goesaert case the plaintiffs are the mother, the owner of a bar, and a daughter, employed by her, both of whom act as barmaids in a bar in the City of Dearborn, Michigan, which has a population, according to the last Federal census, in excess of 50,000. In the Nadroski case, the plaintiffs are a barmaid and a female bar owner, both acting as barmaids in Detroit, Michigan, a city having a population of over 50,000.

The vices in the act, according to the plaintiffs, may be summarized as follows:

1. It sets up an arbitrary standard of 50,000 as the population of any city to come under the act.

2. It discriminates against women owners of bars.

3. It discriminates against women bartenders.

4. It discriminates between daughters of male and female owners.

5. It discriminates between waitresses and female bartenders.

The first question to be considered is whether the statute is unconstitutional because it shows upon its face an unjust and unfair classification as to cities based upon population. The Legislature may have reasonably concluded that the need for regulation of women bartenders was much more urgent in the larger cities and we hold that such classification is not unreasonable and repugnant to the Federal Constitution. In Radice v. People of the State of New York, 264, U. S. 292, a New York statute prohibiting the employment of women in restaurants in cities of the first and second class during the night hours was upheld against the charge that it violated the equal protection clause of the Fourteenth Amendment by making an unreasonable and arbitrary classification. The Court said at page 296:

> [fol. 73] "The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. (citing cases) Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms, renders the statute obnoxious to the Constitution."

Plaintiffs do not challenge the right of the Legislature under its police power to regulate and even prohibit the sale of alcoholic liquor; Twenty-First Amendment to the Constitution of the United States, Carter v. Virginia, 321 U. S. 131; Ziffrin, Inc. v. Reeves, 308 U. S. 132, 138; State Board v. Young's Market Co., 299 U. S. 59, but the plaintiffs say that when the state has legalized the sale of liquors and has authorized the establishment of a place to sell alcoholic beverages, it must treat all persons in the same class alike. They recognize the right of the Legislature to bar all women in the state from acting as bartenders but they say that to permit women to act as waitresses in establishments selling liquor and not permit the same women to act as bartenders in the same establishment, to permit wives and daughters of male license holders to act as bartenders but not women owners or daughters of women owners, constitutes a violation of the Federal Constitution.

The plaintiffs rely heavily on Glicker v. Michigan Liquor Control Commission, 160 F. (2) 96 (6 Circuit). We find that case readily distinguishable from the instant case. It furnishes little support to plaintiffs' contentions. In the Glicker case the plaintiff alleged discriminatory conduct on the part of the defendant, Michigan Liquor Control Commission. It was the discriminatory action on the part of defendant which allegedly deprived plaintiff of the equal protection of the laws as guaranteed by the Fourteenth Amendment. In passing on the motion to dismiss the complaint, the Court held it was controlled by the allegations of fraudulent, wilful and deliberate discrimination against the plaintiff which required a trial of the facts. The instant case presents totally different questions. No allegations of discrimination by conduct are made. Rather, the only allegations of discrimination arise from the interpreta-
[fol. 74] tion of the statute attacked. In construing the statute and in determining whether it violates the Fourteenth Amendment, we are not confronted with or controlled by any allegations in this case respecting the conduct of the defendant. Instead, we read the statute and determine its constitutionality.

The equal protection clause of the Fourteenth Amendment does not prohibit all classification, *per se*. *Atchison, Topeka and Santa Fe Railroad Company* v. *Matthews*, 174 U. S. 96, 103.

The rules for determining whether a statute is arbitrary in its classification and consequently denies the equal protection of the laws to those whom it affects have been succinctly stated in Lindsley v. Natural Carbonic Gas Co., 220 U. S. 59, at page 78:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Further, in New York Rapid Transit Corp. v. City of New York, 303 U. S. 573, at page 578:

> "Although the wide discretion as to classification retained by a legislature often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. (citing cases) Indeed, it has long been the law under the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, * * *.' (citing cases) 'The rule of equality permits many practical inequalities.' (citing cases) 'What satisfies this equality has not been and probably never can be precisely defined.' "

Having these principles in mind, we turn to the Michigan statute under consideration. It is conceivable that the Legislature was of the opinion that a grave social problem existed because of the presence of female bartenders in [fol. 75] places where liquor was served in the larger cities of Michigan. It may have been the Legislature's opinion

that this problem would be mitigated to the vanishing point in those places where there was a male licensee ultimately responsible for the condition and the decorum maintained in his establishment. It may have determined that the self interest of male licensees in protecting the immediate members of their families would generally insure a more wholesome atmosphere in such establishments. The Legislature may also have considered the likelihood that a male licensee could provide protection for his wife or daughter that would be beyond the capacity of a woman licensee to provide for herself or her daughter. The power of the Legislature to make special provision for the protection of women is not denied.

We next consider the claimed discrimination in the statute between female bartenders and female waitresses, and we conclude that the Legislature may also have reasoned that a graver responsibility attaches to the bartender who has control of the liquor supply than to the waitress who merely receives prepared orders of liquor from the bartender for service at a table. It may have determined that the presence of female waitresses does not constitute a serious social problem where a male bartender is in charge of the premises, or where a male licensee bears the ultimate responsibility for the operation therein. It may reasonably be conceived that the Legislature deemed it necessary to have male control of and responsibility for the supply of liquor in the establishment but that it was not necessary to regulate the routine tasks of the waitresses in bringing food and drinks to patrons at individual tables.

In determining what may have motivated the Legislature in enacting this statute we must bear in mind that,

> "A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action."

[fol. 76] Carmichael v. Southern Coal and Coke Co., 301 U. S. 494, at page 510.

It should be emphasized that the Court cannot be concerned with the wisdom of the legislation or its practicability. Nebbia v. New York, 291 U. S. 502, 537.

The plaintiffs' objection that the Legislature may not deny any women the privilege of being employed as a bartender, if the right to engage in such employment is given to any group of women, is also without merit. There is no requirement that the State must extend its regulation to all cases which could be reached and improved by appropriate legislation, in order to sustain the constitutional validity of regulations for the correction of a wrong which in its experience is indicated. Miller v. Wilson, 236 U. S. 373, 384. In Bosley v. McLaughlin, 236 U. S. 385, a California statute limited the permissible hours of work for women to eight hours a day. Graduate nurses, however, were expressly excepted from the operation of the law. The Court rejected the contention that the act violated the equal protection clause of the Constitution. As Mr. Justice Brandeis wrote in Farmers and Merchants Bank of Monroe, North Carolina, et al. v. Federal Reserve Bank of Richmond, Virginia, 262 U. S. 649 at page 661:

> "It is well settled that the legislature of a State may (in the absence of other controlling provisions) direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses."

See also Sproles v. Binford, 286 U. S. 375, 396.

In Fitzpatrick v. Liquor Control Commission, 316 Mich. 83, 93, the constitutionality of the act here under conser-ation was upheld. Although we are not bound by that decision, it is persuasive. The application for an interlocutory injunction is denied.

Dated: Detroit, Michigan, November 20, 1947.

(Signed) Theodore Levin, United States District Judge.

I concur:

(Signed) Charles C. Simons, United States Circuit Judge.

I do not concur for the reasons set out in the attached dissenting opinion:

(Signed) Frank A. Picard, United States District Judge.

[fol. 77] DISSENTING OPINION—Filed November 20, 1947

PICARD, J.—Dissenting:

The only question here is whether the state may disqualify certain women as bartenders while permitting this avenue of employment to other women having less legal right to so act than those prohibited.

Therefore I cannot concur with my respected associates for two reasons:

First, This law in my opinion violates Sec. 1 of the Fourteenth Amendment because it

A. Discriminates between persons similarly situated;

B. Denies plaintiffs equal protection of the laws; and

C. Its proviso that the wife and daughter of a male licensee may act as bartender while denying the same privilege to either the female licensee or her daughter, is palpably arbitrary, capricious and unreasonable, and not based on facts that can reasonably be conceived.

Second, That plaintiffs should be permitted to present evidence before we act on the interlocutory injunction.

First

It violates Sec. 1 of the Fourteenth Amendment.

The material part of Sec. 1 reads as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Conceding that the legislature, guarding the health, safety, and morals of the people, under its police power, has a tremendously wide latitude of discretion (Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61; 78; Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 510); agreeing that any discriminatory classifications need not be

> "with mathematical nicety or because in practice it results in some equality" (Lindsley v. Natural Carbonic Gas Co., supra).

I nevertheless query: What is the purpose of the Fourteenth Amendment if not to prevent gross, unreasonable dis-

crimination of this kind? Both the state and federal constitutions provide for checks and balances. Our legislature has not been given carte blanche to enact any and all kinds of legislation. As stated in Dobbins v. Los Angeles, 195 U. S. 223:

> "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse [fol. 78] for an unjust discrimination, or the oppression or spoilation of a particular class."

No legislature may in effect say

> "We make this distinction, foolish and unfair though we know it to be, because we are in the mood."

It cannot—because our courts have vigilantly and consistently closed the entrance to those fertile fields of unconstitutionality, unfairness and inequality by reiterating again and again that no law may be capricious, unreasonable or arbitrary. This law, in my humble opinion, bears the stigma of all three because:

A—Discriminating Between "Persons Similarly Situated."

Mr. Justice McKenna in Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, says:

> "Those contentions are that the Ohio statute denies plaintiff in error the equal protection of the law and deprives him of liberty and property without due process of law.
>
> "*The first contention can only be sustained if the statute treat plaintiff in error differently from what it does others who are in the same situation as he. That is, in the same relation to the purpose of the statute.*" (Emphasis ours.)

Our own Michigan Supreme Court in People v. Case, 153 Mich. 98, 116 N. W. 558, quoting from a Colorado decision, puts its stamp of approval on the constitutionality of an ordinance because it

> "does not operate as a discrimination between different licensees. It applies equally to everyone of that class * * *"

(Note: The Michigan law cannot pass this test of constitutionality.)

See also State ex rel. Galle v. New Orleans, 67 L.R.A. 76 where the court said:

> "Ordinances must be general in their character, and operate equally upon all persons within the municipality, of the same class, to whom they relate."

In Watson v. Maryland, 218 U. S. 173, we read:

> "The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive *and apply equally to all persons similarly situated.*" (Emphasis ours)

In the case at bar the Michigan Supreme Court boldly admits that this act discriminates between male and female licensees. In Fitzpatrick v. Liquor Control Commission, 25 [fol. 79] N. W. 2d 118, 316 Mich. 83, the court, at page 91 said:

> "Plaintiffs claim (and it must be admitted) that in so doing the legislature has discriminated between male and female licensees, as to who may act as bartenders."

Briefly that proviso permits the male owner, his wife and daughter, to act as bartenders in his business,

But denies the same privilege to both the female owner and her daughter.

If this is not an instance of unjust discrimination against persons similarly situated in the same business, in the same relation to the purpose of the statute and in the same class it would be difficult to find one.

B—It Denies Plaintiffs Equal Protection of the Laws.

Let us review the admitted facts. According to the bill of complaint this is not a new venture for Mrs. Goesaert. She is not just now going into the liquor business under this new law. She started business, bought property, and incurred obligations under a law that permitted her to do exactly what her license said she could do—own and operate a business.

I accept the well known rule of law that a license to sell liquor is not a property right but a privilege; (Glicker v.

Michigan Liquor Control Commission, 160 F. 2d 96) but here the question is not whether this woman will be granted a license. The issue is, having granted her a license can the legislature arbitrarily and unreasonably change the rules in the middle of the game as against her alone because she happens to be a woman licensee.

In this connection it must be remembered that Michigan's liquor law, 18:990, Mich. Stat. Ann., subsection 15, provides that one owning a liquor license, even in a community where the number of licensees operating exceeds the legal quota, may have his or her license renewed each succeeding year, and licenses almost automatically continue from year to year. Even quota restrictions do not prevail if such license was held before May 1, 1945. Plaintiff, Goesaert, did have such a license and evidently the legislature recognized in this privilege a property right that should not be restricted or removed. Still, while refusing to change the [fol. 80] rules as unfair in one section of the act, in the succeeding section the legislature makes the debated change that has abridged her property rights immeasurably.

Where is the "equal protection" for her?

Under this act a woman whose husband, a male licensee, has just died, finds herself at an added disadvantage. She not only has lost her husband, but neither she nor her daughter may help run the family business as they did when the main breadwinner was alive. Across the street her male competitor may permit his wife and daughter to run his business even if he works in a factory miles away.

Has not this woman by every test of reasoning been deprived of the equal protection of the laws?

One's sense of fair play and justice rebels and it is not strange that in validating the constitutionality of this act in the Fitzpatrick case, supra, the court found it expedient to recall Justice Cooley's admonition in "Constitutional Limitations," viz, that courts cannot

> "run a race of right, reason, and expediency with the legislative branch of the state government."

But to this I feel impelled to add an extract from Liggett Co. v. Baldridge, 278 U. S. 105—

> "A state cannot, '*under the guise of protecting the public*, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable

and unnecessary restrictions upon them.'" (Emphasis ours)

C—The Law Is "Palpably Arbitrary, Capricious and Unreasonable"

Lindsley v. National Carbonic Gas Co., (supra) cited by my colleagues, and a widely quoted case, holds that the constitutionality of any legislative enactment may be attacked

> "when it is without any reasonable basis and therefore is purely arbitrary."

And further that

> "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

This law can be upheld then only if it is not arbitrary and unreasonable under any set of facts that can reasonably be [fol. 81] conceived. Well, what facts can those be? The majority opinion seeks to enumerate by stating that the legislature might have had in mind, to-wit:

> "* * * that a grave social problem * * * would be mitgated to the vanishing point in those places where there was a male licensee ultimately responsible for the condition and the decorum maintained in his establishment."

What has been the 14 years' experience of the Liquor Commission on that point? Have there been more, or less, violations where the licensee was a woman acting as her own bartender, as compared to licenses held by males? Has the "decorum" been better or worse?

Another suggested conceivable fact

> "* * * the self interest of male licensees in protecting the immediate members of their families would generally insure a more wholesome atmosphere in such establishments."

What has been the experience here? Would not a widow, for example, with a valuable license be more determined

than a male licensee in protecting her family and livelihood? Is a father more interested in assuring a "wholesome atmosphere" than a mother?

Further, that the legislature

> "may also have considered the likelihood that a male licensee could provide protection for his wife or daughter that would be beyond the capacity of a woman licensee * * *"

But it must be remembered that no male adult is required to be present when the wife or daughter is bartender. In fact it is common knowledge that there are many male licensees who have other jobs, helping out only in the bar, daytimes, if working nights, or at night when working daytime. Surely the wife or daughter of a male licensee is just as subject to the perils of her employment, in the absence of her husband or father, as the female licensee or her daughter. Has not the female licensee provided protection to herself and daughter in the past?

We are immediately challenged that this goes to the wisdom of the legislature and we agree that the wisdom of what the legislature has done is not the issue. This goes beyond the "wisdom," and we have searched in vain for the faintest semblance of facts that can be "reasonably conceived" to bolster this admittedly discriminatory legislation.

Nor can its enactment be logically defended on the theory that the police power is an inherent right of legislatures [fol. 81-A] in matters of public health, safety, and morals. It is still necessary that the distinction be reasonably related to the object of the legislation; (Rapid Transit Corp. v. New York, 303 U. S. 573) and in holding an ordinance which prohibited sale of liquor in dry goods stores unconstitutional (Chicago v Netcher, 183 Ill. 104) the court said:

> "The restriction is purely arbitrary, not having any connection with and not tending in any way towards the protection of, the public against the evils arising from the sale of intoxicating liquor."

Can it be contended that it promotes public *safety* to permit only women to act as bartenders who happen to be the wife or daughter of the male owner of the busi-

ness while neither the woman who owns her own license nor her daughter can so act?

Can it be contended that a woman bartender would promote the *morals* of an establishment if her husband or her father were the licensee more than if she or her mother held the license?

And is it claimed that the male owner is more solicitous of sanitation or *public health* than the female?

On all three points, safety, morals, and health, would not the contrary be more likely to exist?

Something New?

My colleagues cite as "persuasive" but "not controlling" the Michigan decision in Fitzpatrick v Liquor Control Commission, supra. Let us examine two citations given therein.

On page 124 (N.W.) it refers to Section 5363 of the Michigan Compiled Laws, 1897, to-wit—

> "That this act shall not be so construed as to prevent the wife or other females who are bona fide members of the family of a proprietor of a saloon from tending bar or serving liquors in his saloon."

This may well be the fount from which the present provision in our law drew the breath of life so further analysis is interesting. The words "in His saloon" are significant. Seldom if ever, fifty years ago, were women granted licenses to sell liquor. As a matter of fact women were not frequenters of bars or saloons. There was an ingenious subterfuge labeled "family entrance" but comparatively few [fol. 82] woman availed themselves of that means of seeking refreshments. Today there is no such prohibition affecting women. They can and are licensees, and can and do frequent places where liquor is sold. The 1897 law has no application.

The second citation refers to the California ordinance, People v Jennez, 49 Ca. App. 2d Supp. 739, 121 Pacific 2d, 543, 544, claimed by our Michigan Supreme Court to be a "case quite in point with the case at bar." We quote:

> "The provisions of this section shall not apply to the mixing of alcoholic beverages * * * *by any on-sale* licensee nor to the mixing of such beverages *by the wife of any licensee* on the premises for which her husband holds an on-sale license." (Emphasis ours)

Obviously in California a woman may also be a licensee and it is worthy of note that in California if a woman is the licensee She May act as bartender to the same extent as the wife of the male licensee. We agree that the case is in point but for plaintiffs—not defendant.

Not only California but other states having similar legislation have carefully avoided writing in any liquor prohibition that places women in different categories.

Many of these "similar laws" are cited in defendant's brief but I find upon scrutiny that by inference at least, all favor plaintiffs and not defendant.

In Cronin v Adams, 192 U. S. 108, a case relating to the constitutionality of a Denver ordinance, we find that women —All Women including the wife and female children of the owner—were prohibited from entering any saloon.

In People v Case, Supra, the Flint ordinance barred women—All Women—from being in or about the bar.

In City of Hoboken v Goodman, 68 N.J.L. 217; 51 Atl. 1092, the ordinance in question is very significant. It prevented any female from acting as bartender unless she was the wife of the owner Or owned The Business Herself.

The California Statutes (Deering's California General Laws, Vol. 2, Act 3796, page 1353, Sec. 56.4 page 1413) also exempted from the class prohibited the wife of the owner And The Owner Herself.

[fol. 83] In Nelson, Chief of Police v State, ex rel, Gross, 26 So. (2nd) 60, the prohibition was against All Women—no exceptions.

Does it mean nothing that all states passing similar laws have avoided drawing the distinctions between women bartenders that Michigan has?

Can it be that members of the legislatures of those states are less solicitous of their women folks than Michigan? Or has "chivalry" (Fitzpatrick case, supra) returned to the Michigan legislature alone among our forty-eight states?

Second

Plaintiffs should be permitted to present evidence.

Under subdivision C of the first section, I ask what the experience of the Liquor Control Commission has been on those certain suggested facts that could reasonably "be conceived" to substantiate the law. This is in line with

accepted decisions such as Borden's Co. v Baldwin 293 U.S. 194, where Mr. Justice Stone and Mr. Justice Cordozo, concurring, said:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

The same rule of equity is followed in Polk Co. v Glover, 305 U.S. 5; Gibbs v Buck, 307 U.S. 66; Franklin Tp. in Somerset County, N. J. v Tugwell, 85 F. 2d 208; and a very able but dissenting opinion by Justice Hughes—Moorehead v N. Y. ex rel. Tipaldo, 298 U.S; 587.

Plaintiffs herein specifically charge that the law is arbitrary and our courts are unanimous that they should have an opportunity to prove their case. On the other hand, if we refuse to continue the injunction to hear what proofs they may have the damage to their business will have been done before any action on appeal can be taken. In any event, plaintiffs should be permitted to develop the factual situation.

The Glicker Case

Before concluding I again refer to Glicker v Michigan Liquor Commission, supra. While the issue there was dif- [fol. 84] ferent there is much in common between these two cases and much substance in the Glicker case that can be applied here.

For example, on page 99 we find—

> "In Hartford Steam Boiler Inspection & Insurance Company v Harrison, 301 U. S. 459, 57 S. Ct. 838, 839, 81 L. Ed. 1223, the Court pointed out that while the Fourteenth Amendment allows reasonable classification of persons, yet it forbids unreasonable or arbitrary classification or treatment, and * * * the rights of all persons must rest upon the same rule under similar circumstances * * * In Sunday Lake Iron Company v. Township of Wakefield, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154, the Court said at page 352 of 247 U.S., at page 495 of 38 S. Ct., 62 L. Ed. 1154—'The purpose of the equal protection clause of the Fourteenth

Amendment is to secure every person within the State's jurisdiction against Intentional And Arbitrary Discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted against.' (Emphasis added.) * * * Snowden v Hughes, supra, 321 U.S. 1, at page 8, 64 S. Ct. 397, at page 401, 88 L. Ed. 497, 'The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection Unless There Is Shown To Be Present In It An Element Of Intentional Or Purposeful Discrimination.' (Emphasis added.)

The above could have been written for this case.

Conclusion

For the reasons given and believe I firmly believe that if this court endorses this type of discriminating legislation it opens the door for further fine "distinctions" that will eventually be applied to religion, education, politics and even nationalities, I must dissent.

(Signed) Frank A. Picard, United States District Judge.

Dated: November 20th, 1947.

[fol. 85] In the District Court of the United States

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

Order Denying Injunction and Dismissing Complaint—Filed November 28, 1947

At a session of said Court held at the Courthouse in the City of Detroit, on this 28th day of November, A. D., 1947.

Present The Honorable Theodore Levin, United States District Judge.

The consolidated applications of the plaintiffs for interlocutory injunction in the above entitled causes having

come on to be heard before a court of three Judges convened pursuant to Judicial Code Sec. 266, and it having been stipulated between the parties that the hearing on the interlocutory injunction be considered the hearing on the merits, and the opinions of the Court having been filed,

Now, Therefore, It Is Ordered that the applications for an interlocutory injunction be and they are hereby denied, and that the Complaints of the plaintiffs be dismissed without costs.

It having been represented to the Court that a Claim for Appeal is to be filed with the Supreme Court of the United States and an application having been made to this Court that a restraining Order issue pending the filing of the Application for Appeal and until such time as disposition is made by the Supreme Court of the United States on the [fol. 86] Application for Appeal or the hearing on the Appeal and a determination is made by the Supreme Court of the United States, and no objection having been entered, therefore

It Is Ordered that the defendants, Owen J. Cleary, Felix H. H. Flynn and G. Mennen Williams, members of the Liquor Control Commission of the State of Michigan, be and are hereby restrained from enforcing Section 19(a) of the Liquor Law of the State of Michigan, which was added by Act 133 of the Public Acts of the State of Michigan for 1945, pending the application for Appeal to the Supreme Court of the United States and a determination by the Supreme Court of the United States upon the hearing on appeal.

It Is Further Ordered that the plaintiffs file a bond in the sum of Two Hundred and Fifty Dollars ($250.00), the condition of said bond being that if the plaintiffs fail to make application for appeal within the period allotted therefor, or fail to obtain an order granting their application, or fail to make their pleas good in the Supreme Court, they shall answer for all damages and costs which the defendants may sustain by reason of the stay.

Theodore Levin, United States District Judge.

[fol. 87] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

STIPULATION TO CONSOLIDATE CASES FOR THE PURPOSE OF APPEAL—Filed February 5, 1948

It Is Hereby Stipulated by and between the above named parties, through their respective counsel, that the above cases be consolidated for the purpose of the appeal, in order that only one record need be printed.

Davidow & Davidow, by Anne R. Davidow, Attorneys for Plaintiffs. Eugene F. Black, Attorney General of Michigan, by Ben. H. Cole, Assistant Attorney General, Attorneys for Defendants.

Dated this 5th day of February, 1948.

ORDER CONSOLIDATING CASES FOR PURPOSE OF APPEAL

At a session of said Court held at the Court House in the City of Detroit, on this 5th day of February, 1948.

Present: The Honorable Theodore Levin, United States District Judge.

Upon reading and filing the stipulation of counsel for the respective parties that the above entitled causes be consolidated for the purpose of an appeal to be filed in this Court and cause,

It Is Ordered that the above entitled causes be consolidated for the purpose of the appeal to be filed in the above entitled causes, in accordance with such stipulation.

Theodore Levin, United States District Judge.

[fol. 88] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 17, 1948

Now come Valentine Goesaert, Margaret Goesaert, Gertrude Nadroski and Caroline McMahon, plaintiffs, by their attorneys, Davidow & Davidow, and feeling themselves aggrieved by the final Decree of this Court entered on the 28th day of November, 1947, and believing that the final decree of the Court and the opinions, findings and conclusions of the majority of the Court, upon which the decree is based, are erroneous, plaintiffs pray for an allowance of an appeal from said final decree, insofar as said decree denies any relief asked by the plaintiff, to the Supreme Court of the United States.

Plaintiffs further say that the errors upon which plaintiffs claim to be entitled to an appeal are more fully set out in the Assignment of Errors and Prayer for Reversal filed in the office of the Clerk of the Court and presented herewith.

Plaintiffs have also filed in the Clerk's office and present herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided in Rule No. 12 of the Rules of the Supreme Court.

Davidow & Davidow, by Anne R. Davidow, Attorneys for Plaintiffs.

Dated at Detroit, Michigan, this 17th day of February, 1948.

[fol. 89] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

ORDER ALLOWING APPEAL—Filed February 17, 1948

At a session of said Court held at the Federal Building in the City of Detroit, Michigan, on this 17th day of February, 1948.

Present: The Honorable Theodore Levin, United States District Judge.

Plaintiffs having presented to the Court their petition for appeal to the Supreme Court of the United States from the final decree of the Court, and said petition being accompanied by an Assignment of Errors and a Statement as to the Jurisdiction of the Surpeme Court, and said papers and the Record herein having been considered,

It Is Now Ordered by this Court that the Plaintiffs are allowed an appeal to the Supreme Court of the United States from the final Decree of this Court.

It Is Further Ordered that plaintiffs shall file security for costs in the sum of Two Hundred and Fifty Dollars ($250.00).

Theodore Levin, United States District Judge.

[fols. 90-91] Bond on appeal for $250.00 approved and filed Feb. 17, 1948, omitted in printing.

[fol. 92] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

ASSIGNMENT OF ERRORS—Filed February 17, 1948

Now come the above named plaintiffs and appellants, by Davidow & Davidow, their attorneys, and in connection with

their petition for appeal say that, in the record, proceedings and in the final order aforesaid, manifest error has intervened to the prejudice of the appellants, to wit:

1. The Court erred in not finding that the provision of Act 133 of the Public Acts of the State of Michigan for 1945, Michigan Statutes Annotated, Sec. 18.990(1) setting up the standard of 50,000 population according to the last Federal Census, was an arbitrary and unreasonable classification.

2. The Court erred in not finding that the provisions of the said Act 133 of the Public Acts of the State of Michigan for 1945 was unjust and unfair classification as to sex.

3. The Court erred in not finding that the classification in said Act limiting the registration of bartenders to "male persons and wives and daughters of male owners" was an unfair discrimination against women owners of bars.

4. The Court erred in not finding that the classification in said Act limiting the registration of bartenders to "male persons and wives and daughters of male owners" was an [fols. 93-113] unfair discrimination against women bartenders.

5. The Court erred in not finding that the classification in said Act limiting the registration of bartenders to "male persons and wives and daughters of male owners" was an unfair discrimination against daughters of female owners.

6. The Court erred in not finding that the classification in said Act limiting the registration of bartenders to "male persons and wives and daughters of male owners" was an unfair discrimination between waitresses and female bartenders.

7. The Court erred in not finding that Section 19 (a) of said Act, added by Act 133 P.A. of 1945, is repugnant to the Fourteenth Amendment to the Constitution of the United States, in that it creates an unreasonable and arbitrary classification, and denies the plaintiffs of the equal protection of the laws.

8. The Court erred in relying on conjecture and supposition as to the reasons for the action by the Michigan Legislature in enacting said Act.

9. The Court erred in not accepting plaintiffs' allegations of fact as true, in view of defendants' Motion to Dismiss.

10. The Court erred in assuming facts without the taking of testimony.

11. The decree dismissing plaintiffs' Amended Complaints is contrary to law.

Wherefore, appellants pray that the decree of the District Court of the United States, Eastern District of Michigan, Southern Division, may be reversed and a decree entered finding Act 133 of the Public Acts of the State of Michigan for 1945, Sec. 18.990 (1) Michigan Statutes Annotated, repugnant to the Fourteenth Amendment to the Constitution of the United States, and granting an injunction restraining the enforcement of said Act.

Davidow & Davidow, by Anne R. Davidow, Attorneys for Plaintiffs and Appellants.

Dated at Detroit, Michigan this — day of February, A. D., 1948

[fol. 114] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed February 18, 1948

To the Clerk of the Court:

Please take notice that the following portions of the record are to be incorporated in the transcript on appeal to the Supreme Court of the United States:

1. Amended Complaints of the plaintiffs and appellants.
2. Temporary injunction and convening of three judges court.
3. Defendants' motion to dismiss.
4. The last stipulation and order adjourning the hearing and continuing injunction.
5. Affidavits in support of plaintiffs' showing.

6. Transcript of proceedings of September 9, 1947, before the Court of three judges.

7. Opinion of the Honorable Theodore Levin.

8. Opinion of the Honorable Frank A. Picard.

9. Order denying injunction and dismissing the complaint.

[fols. 115-128] 10. Stipulation consolidating cases for appeal.

11. Order consolidating cases for appeal.

12. Petition for allowance of appeal to the Supreme Court and Order allowing appeal.

13. Bond on Appeal.

14. Assignment of Errors and Prayer for Reversal.

15. Statement of Jurisdiction of the Supreme Court of the United States.

16. Praecipe for transcript of Record on Appeal.

17. Notice to defendants of petition for appeal, order allowing appeal, bond on appeal, assignment of errors, statement as to jurisdiction.

18. Proof of service of notice of petition for appeal, order allowing appeal, bond on appeal, assignment of errors and statement as to jurisdiction.

Davidow & Davidow, by Anne R. Davidow, Attorneys for Plaintiffs and Appellants.

[fol. 129] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

Civil Action No. 6618

[Titles omitted]

STIPULATION TO INCLUDE STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS IN TRANSCRIPT OF THE RECORD—Filed March 12, 1948

It is hereby stipulated by and between the above named parties, through Larry S. Davidow and Anne R. Davidow, attorneys for plaintiffs, and Eugene F. Black, Attorney General of the State of Michigan, by Edmund E. Shepherd, Solicitor General of the State of Michigan, that the State-

ment in Opposition to the Jurisdiction and Motion to Dismiss and Affirm be included in the Transcript of the Record.

Larry S. Davidow and Anne R. Davidow, Attorneys for Plaintiffs, by Anne R. Davidow. Eugene F. Black, Attorney General, by Emund C. Shepherd, Solicitor General.

Dated this 10th day of March, A.D., 1948.

[fol. 130] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6619

Civil Action No. 6618

[Titles omitted]

STIPULATION EXTENDING TIME WITHIN WHICH TO DOCKET CASES AND FILE RECORD—Filed March 12, 1948

Whereas it is physically impossible to prepare the transcript of the Record for transmission to the Clerk of the Supreme Court of the United States and to docket the case before the expiration of the return of the Citation heretofore issued in the above entitled court and cause, therefore

It is stipulated by and between the parties hereto, through their respective counsel, that the time within which the above cases shall be docket- and the Record filed be extended to May 19, 1948, and that an Order be entered in accordance with this stipulation.

Larry S. Davidow and Anne R. Davidow, Attorneys for Plaintiffs, by Anne R. Davidow. Eugene F. Black, Attorney General, by Edmund C. Shepherd, Solicitor General.

Dated this 10 day of March, 1948.

[fol. 131] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

ORDER EXTENDING TIME WITHIN WHICH TO DOCKET CASES AND FILE RECORD—Filed March 12, 1948

At a session of said Court held at the Court House in the City of Detroit, Michigan, on this 12th day of March, A.D., 1948,

Present: Honorable Theodore Levin, United States District Judge.

It appearing to this Court by stipulation of the parties through their respective counsel that it is impossible to prepare the transcript of the Record in time so that the cases may be docketed before the return day of the Citation heretofore issued in this Court and cause, and the Court being fully advised in the premises,

It is ordered that the time within which the above entitled cases shall be docketed and the Record filed be and is hereby extended to May 19, 1948.

Theodore Levin, United States District Judge

[fol. 132] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

PRAECIPE FOR ADDITIONAL PORTIONS OF RECORD ON APPEAL

To the Clerk of the Court:

Please take notice that in addition to those designated by counsel for the plaintiffs-appellants, the following portions

of the record are to be incorporated in the transcript on appeal to the Supreme Court of the United States:

1. Appellees' Statement as to Jurisdiction and Motion to dismiss or affirm, filed pursuant to paragraph 3, Rule 12 of the Supreme Court of the United States.

Edmund C. Shepherd, Solicitor General of the State of Michigan, Counsel for Appellees.

[fols. 133-134] Citation in usual form filed February 18, 1948, omitted in printing.

[fol. 135] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 6618

Civil Action No. 6619

[Titles omitted]

STIPULATION RE COMPARISON OF RECORD—Filed April 29, 1948

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court without comparison.

Davidow & Davidow, by Anne R. Davidow, Attorneys for Plaintiffs and Appellants; Edmund C. Shepherd, Attorney for Defendants and Appellees.

Dated at Detroit, Michigan this 15 day of April, 1948.

[fols. 136-137] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 138] IN THE SUPREME COURT OF THE UNITED STATES

DESIGNATION OF RECORD TO BE PRINTED AND STATEMENT OF POINTS RELIED UPON—Filed May 29, 1948

Now come the above named Appellants, by Anne R. Davidow, their attorney, and state that the entire Record as

certified is necessary for consideration of the points to be relied upon in their appeal, and that the Statement of Points Relied Upon by the Appellants in their appeal is the same as the Assignments of Errors contained in the Record.

Anne R. Davidow, Attorney for Plaintiffs and Appellants, 3210 Book Tower, Detroit 26, Michigan, WO-2-9144.

[fol. 139] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 24, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 53,010. Eastern Michigan, D. C. U. S., Term No. 780. Valentine Goesaert, Margaret Goesaert, Gertrude Nadroski and Caroline McMahon, Appellants, vs. Owen J. Cleary, Felix H. H. Flynn and G. Mennan Williams, Members of the Liquor Control Commission of the State of Michigan. Filed May 1, 1948. Term No. 780 O.T. 1947.

No. 780

Supreme Court of The United States of America

Appeal from a Court of Three Judges of the District Court of the United States, for the Eastern District of Michigan, Southern Division

VALENTINE GOESAERT, et al, *Plaintiffs and Appellants,* vs OWEN J. CLEARY, et al, *Defendants and Appellees.*	Civil Action No. 6618
GERTRUDE NADROSKI, et al, *Plaintiffs and Appellants,* vs OWEN J. CLEARY, et al, *Defendants and Appellees.*	Civil Action No. 6619

Statement As To Jurisdiction and.

Brief of Plaintiffs and Appellants in Opposition to Appellees' Motion To Dismiss or Affirm

LARRY S. DAVIDOW,
ANNE R. DAVIDOW,
Attorneys for Plaintiffs and Appellants,
3210 Book Tower,
Detroit 26, Michigan.

The Legal Chronicle, 525 Woodward, Detroit 26, Mich.

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Supreme Court of The United States of America

Appeal from a Court of Three Judges of the District Court of the United States, for the Eastern District of Michigan, Southern Division

VALENTINE GOESAERT, et al, *Plaintiffs and Appellants,* - vs - OWEN J. CLEARY, et al, *Defendants and Appellees.*	Civil Action No. 6618
GERTRUDE NADROSKI, et al, *Plaintiffs and Appellants,* - vs - OWEN J. CLEARY, et al, *Defendants and Appellees.*	Civil Action No. 6619

Brief of Plaintiffs and Appellants in Opposition to Appellees' Motion To Dismiss or Affirm

Now come the plaintiffs and appellants in the above entitled causes, by Larry S. Davidow and Anne R. Davidow, their attorneys, and submit their brief in opposition to appellees' Motion to Dismiss their appeal or Affirm the Decision of the District Court.

Appellants deny that the questions raised on their behalf are so unsubstantial as not to need further argument, which is the only reason or ground relied upon by appellees in their motion.

On the contrary, appellants contend that the questions raised on their behalf are substantial as will appear by a reading of their statement as to the Jurisdiction of this Court filed in the District Court at the time of the filing of their Petition for Appeal to this Court. The Trial Court allowed the appeal and issued the Citation.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The above causes were consolidated by stipulation and order for the purpose of this appeal. Petition for Appeal and Order Allowing the Appeal, Assignment of Errors and Prayer for Reversal were filed in the United States District Court for the Eastern District of Michigan, on the 17th day of February, A. D., 1948.

These are civil actions brought in the District Court of the United States for the Eastern District of Michigan, Southern Division, in pursuance of Section 266 of the Judicial Code as amended, Section 380, of Title 28 of the United States Code Annotated, for an injunction, temporary and permanent, to restrain the enforcement, operation, and execution of Act 133 of the Public Acts of the State of Michigan for 945, Section 18.990 (1) Michigan Statutes Annotated, upon the ground of unconstitutionality of said Michigan statute.

This appeal is being taken direct to the Supreme Court of the United States in pursuance of Section 380, Title 28 of

the Judicial Code and Judiciary of the United States Code (Judicial Code, Section 266, amended,) which provides, in the matter of appeals as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

A final Order was entered in the above entitled cases on the 28th day of November, 1947, which dismissed the plaintiffs' Amended Complaints and denied plaintiffs' applications for interlocutory injunctions. It contained a restraining order, restraining the enforcement of said statute pending the application for appeal to the United States Supreme Court and pending the decision of the Supreme Court of the United States upon the hearing on appeal.

Plaintiffs believe that the following cases sustain the jurisdiction of the United States Court:

Looney v. *Crane Co.*, 245 U. S. 178; 62 L. Ed. 230.

Sterling v. *Constantin*, et al, 287 U. S. 378; 77 L. Ed. 375.

Parker v. *Brown*, 317 U. S. 341; 87 L. Ed. 315.

The court of three judges sitting in the United States District Court for the Eastern District of Michigan, Southern Division upon the hearing of the plaintiffs' application for an interlocutory injunction, recognized and accepted the jurisdiction of the United States Court, the actions of the plaintiffs being brought under Section 41, Subdivision (1), Title 28 of the Judicial Code and Judiciary of the United States Code Annotated. The Court of three judges was convened in pursuance of Sec. 380 Title 28 Judicial Code and Judiciary of the United States Code Annotated.

NATURE OF THE ACTION

Plaintiffs are bar owners who act as barmaids in their own establishments, daughters of female owners, who work as barmaids in the establishments owned by their mothers, and female barmaids. The actions are civil actions brought in their own behalf and in behalf of others similarly situated. Their Complaints and Amended Complaints claim that Act 133 of the Public Acts of the State of Michigan for 1945 (Sec. 19 (a) of the Liquor Control Act, being Sec. 18.990 of the Michigan Statutes Annotated, 1946 Cum. Supp.) which provides:

> "No person shall act as bartender in any establishment licensed under this act to sell alcoholic liquor for consumption on the premises in any city now or hereafter having a population of 50,000 or more, unless such person shall be licensed by the commission under the provisions of this section: Provided, That the commission may adopt rules and regulations governing the licensing of bartenders in other political subdivisions of the state. Such licenses shall expire on the thirtieth day of April following the issuance thereof. An annual license fee of $2.00 shall be paid by such applicant, which shall be credited to the general fund of the state. Each applicant for license shall be a male person 21 years of age or over, shall submit a certificate from his local board of health or health officer showing that such person is not affected with any infectious or communicable disease, and shall meet the requirements of the commission; Provided, That the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish. A license issued under the provisions of this section may be revoked or suspended by the commission in case the licensee shall drink on duty or shall violate

the rules and regulations of the commission. In case of the refusal to issue or the revocation or suspension of a license by the commission, the person aggrieved shall be entitled to a hearing before the commission. The findings of the commission at such hearing shall be final as to questions of fact. The commission shall issue to each licensee an identification card to which shall be attached a photograph of the licensee. Such identification card shall be carried by the licensee at all times while on duty and shall be shown by such licensee on request. For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar."

is repugnant to Section 1 of the 14th Amendment to the Constitution of the United States of America, in the following respects:

(1) It denies the plaintiffs the equal protection of the laws, and, if enforced by defendants, will deprive plaintiffs of their property without due process of law, because it sets up an arbitrary standard of 50,000 as the population of any community to come under the Act;

(2) It discriminates against women owners;

(3) It discriminates against women bartenders;

(4) It discriminates between daughters of male and female owners;

(5) It discriminates between waitresses and female bartenders;

(6) Because the discrimination is arbitrary and unreasonable, in view of the fact that the provisions of the Liquor Law of the State of Michigan are adequate to provide for proper supervision and regulation of the sale of alcoholic beverages, without the Act herein complained of;

(7) That the attempted classification is unreasonable and arbitrary;

(8) Because the Act, upon its face, shows an unjust and unfair classification, both as to sex and communities based upon population;

(9) The classification attempted in said Act is not within the police power of the State of Michigan;

(10) The attempted classification has nothing to do with the regulation of the liquor traffic in the State of Michigan, the said liquor traffic being fully regulated by previous statutes and rules and regulations of the defendants.

RULING OF THE COURT

The majority opinion denying plaintiffs the relief prayed was signed and filed in the above entitled causes by the Honorable Theodore Levin, United States District Judge, and concurred in by the Honorable Charles C. Simons, Judge of the U. S. Circuit Court of Appeals, 6th Circuit. A dissenting opinion was signed and filed by the Honorable Frank A. Picard, United States District Judge. Copies of said opinions are hereto attached, in pursuance of Rule 12, Sec. 1, Supreme Court Rules.

A final order denying the injunction and dismissing the Complaints was signed by the Honorable Theodore Levin, United States District Judge on the 28th day of November, 1947.

OPINION

Before: Charles C. Simons, Circuit Judge, Frank A. Picard, Theodore Levin, District Judges

Levin J. These cases, brought as class actions under Rule 23 of the Federal Rules of Civil Procedure, were consolidated and are now before this Court of Three Judges, convened pursuant to Judicial Code Sec. 266 as amended, on an application for an interlocutory injunction to restrain the enforcement of a law of the State of Michigan enacted by the Legislature on April 30, 1945, known as Act 133 of the Public Acts of 1945, Mich. Stat. Ann. Sec. 18.990 (1).

The complete act is set out in the margin hereof. The pertinent portion of the legislation which the plaintiffs urge in their suits as being violative of the Fourteenth Amendment to the Constitution of the United States, in that it denies them the equal protection of the laws and deprives them of their property without due process of law, may be summarized as follows:

That in any city now or hereafter having a population of 50,000 or more, no female shall be licensed as a bartender (a bartender being described as a person who mixes or pours alcoholic liquor behind the bar), unless such person be the wife or daughter of the male owner of the licensed liquor establishment.

In the *Goesaert* case the plaintiffs are the mother, the owner of a bar, and a daughter employed by her, both of whom act as barmaids in a bar in the City of Dearborn, Michigan, which has a population, according to the last Federal census, in excess of 50,000. In the *Nadroski* case, the plaintiffs are a barmaid and a female bar owner, both

acting as barmaids in Detroit, Michigan, a city having a population of over 50,000.

The vices in the act, according to the plaintiffs, may be summarized as follows:

1. It sets up an arbitrary standard of 50,000 as the population of any city to come under the act.

2. It discriminates against women owners of bars.

3. It discriminates against women bartenders.

4. It discriminates between daughters of male and female owners.

5. It discriminates between waitresses and female bartenders.

The first question to be considered is whether the statute is unconstitutional because it shows upon its face an unjust and unfair classification as to cities based upon population. The Legislature may have reasonably concluded that the need for regulation of women bartenders was much more urgent in the larger cities and we hold that such classification is not unreasonable and repugnant to the Federal Constitution. In *Radice* v. *People of the State of New York,* 264 U. S. 292, a New York statute prohibiting the employment of women in restaurants in cities of the first and second class during the night hours was upheld against the charge that it violated the equal protection clause of the Fourteenth Amendment by making an unreasonable and arbitrary classification. The Court said at page 296:

> "The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. (citing cases) Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms, renders the statute obnoxious to the Constitution."

Plaintiffs do not challenge the right of the Legislature under its police power to regulate and even prohibit the sale of alcoholic liquor; Twenty-First Amendment to the Constitution of the United States, *Carter* v. *Virginia*, 321 U. S. 131; *Tiffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138; *State Board* v. *Young's Market Co.*, 299 U. S. 59, but the plaintiffs say that when the state has legalized the sale of liquors and has authorized the establishment of a place to sell alcoholic beverages, it must treat all persons in the same class alike. They recognize the right of the Legislature to bar all women in the state from acting as bartenders but they say that to permit women to act as waitresses in establishments selling liquor and not permit the same women to act as bartenders in the same establishment, to permit wives and daughters of male license holders to act as bartenders but not women owners or daughters of women owners, constitutes a violation of the Federal Constitution.

The plaintiffs rely heavily on *Glicker* v. *Michigan Liquor Control Commission*, 160 F. (2) 96 (6 Circuit). We find that case readily distinguishable from the instant case. It furnishes little support to plaintiffs' contentions. In the *Glicker* case the plaintiff alleged discriminatory conduct on the part of the defendant, Michigan Liquor Control Commission. It was the discriminatory action on the part of defendant which allegedly deprived plaintiff of the equal protection of the laws as guaranteed by the Fourteenth Amendment. In passing on the motion to dismiss the complaint, the Court held it was controlled by the allegations of fraudulent, wilful and deliberate discrimination against the plaintiff which required a trial of the facts. The instant case presents totally different questions. No allegations of discrimination by conduct are made. Rather, the only allegations of discrimination arise from the interpretation of the statute attacked. In construing the statute and in de-

termining whether it violates the Fourteenth Amendment, we are not confronted with or controlled by any allegations in this case respecting the conduct of the defendant. Instead, we read the statute and determine its constitutionality.

The equal protection clause of the Fourteenth Amendment does not prohibit all classification, *per se. Atchison, Topeka and Santa Fe Railroad Company* v. *Matthews,* 174 U. S. 96, 103.

The rules for determining whether a statute is arbitrary in its classification and consequently denies the equal protection of the laws to those whom it affects have been succinctly stated in *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 59, at page 78:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Further, in *New York Rapid Transit Corp.* v. *City of New York,* 303 U. S. 573, at page 578:

> "Although the wide discretion as to classification retained by a legislature, often results in narrow distinc-

tions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification, (citing cases). Indeed, it has long been the law under the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, . . .' (citing cases). 'The rule of equality permits many practical inequalities.' (citing cases). 'What satisfies this equality has not been and probably never can be precisely defined.'"

Having these principles in mind we turn to the Michigan statute under consideration. It is conceivable that the Legislature was of the opinion that a grave social problem existed because of the presence of female bartenders in places where liquor was served in the larger cities of Michigan. It may have been the Legislature's opinion that this problem would be mitigated to the vanishing point in those places where there was a male licensee ultimately responsible for the condition and the decorum maintained in his establishment. It may have determined that the self interest of male licensees in protecting the immediate members of their families would generally insure a more wholesome atmosphere in such establishments. The Legislature may also have considered the likelihood that a male licensee could provide protection for his wife or daughter that would be beyond the capacity of a woman licensee to provide for herself or her daughter. The power of the Legislature to make special provision for the protection of women is not denied.

We next consider the claimed discrimination in the statute between female bartenders and female waitresses, and we conclude that the Legislature may also have reasoned that a graver responsibility attaches to the bartender who has control of the liquor supply than to the waitress who merely receives prepared orders of liquor from the bartender for service at a table. It may have determined that

the presence of female waitresses does not constitute a serious social problem where a male bartender is in charge of the premises, or where a male licensee bears the ultimate responsibility for the operation therein. It may reasonably be conceived that the Legislature deemed it necessary to have male control and responsibility for the supply of liquor in the establishment but that it was not necessary to regulate the routine tasks of the waitresses in bringing food and drinks to patrons at individual tables.

In determining what may have motivated the Legislature in enacting this statute we must bear in mind that,

> "A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it can not record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action." *Carmichael* v. *Southern Coal and Coke Co.*, 301 U. S. 494 at page 510.

It should be emphasized that the Court cannot be concerned with the wisdom of the legislation or its practicability. *Nebbia* v. *New York*, 291 U. S. 502, 537.

The plaintiffs' objection that the Legislature may not deny any woman the privilege of being employed as a bartender, if the right to engage in such employment is given to any group of women, is also without merit. There is no requirement that the State must extend its regulation to all cases which could be reached and improved by appropriate legislation, in order to sustain the constitutional validity of regulations for the correction of a wrong which in its experience is indicated. *Miller V. Wilson*, 236

U. S. 373, 384. *In Bosley* v. *McLaughlin,* 236 U. S. 385, a California statute limited the permissible hours of work for women to eight hours a day. Graduate nurses, however, were expressly excepted from the operation of the law. The Court rejected the contention that the act violated the equal protection clause of the Constitution. As Mr. Justice Brandeis wrote in *Farmers and Merchants Bank of Monroe, North Carolina, et al* v. *Federal Reserve Bank of Richmond, Virginia,* 262 U. S. 649 at page 661:

> "It is well settled that the legislature of a State may (in the absence of other controlling provisions) direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses."

See also *Sproles* v. *Binford,* 286 U. S. 375, 396.

In *Fitzpatrick* v. *Liquor Control Commission,* 316 Mich. 83, 93, the constitutionality of the act here under consideration was upheld. Although we are not bound by that decision, it is persuasive. The application for an interlocutory injunction is denied.

Dated: Detroit, Michigan
November 20, 1947

(signed) Theodore Levin,
United States District Judge.

I concur:

(signed) Charles C. Simons,
United States Circuit Judge.

I do not concur for the reasons set out in the attached dissenting opinion:

(signed) Frank A. Picard,
United States District Judge.

PICARD, J.—Dissenting

The only question here is whether the state may disqualify certain women as bartenders while permitting this avenue of employment to other women having less legal right to so act than those prohibited.

Therefore I cannot concur with my respected associates for two reasons:

First, This law in my opinion violates Sec. 1 of the Fourteenth Amendment because it:

A. Discriminates between persons similarly situated;

B. Denies plaintiffs equal protection of the laws; and

C. Its proviso that the wife and daughter of a male licensee may act as bartender while denying the same privilege to either the female licensee or her daughter, is palpably arbitrary, capricious and unreasonable, and not based on facts that can reasonably be conceived.

Second, That plaintiffs should be permitted to present evidence before we act on the interlocutory injunction.

FIRST

It Violates Sec. 1 of the Fourteenth Amendment

The material part of Sec. 1, reads as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Conceding that the legislature, guarding the health, safety, and morals of the people, under its police power,

has a tremendously wide latitude of discretion (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; 78; *Carmichael* v. *Southern Coal and Coke Co.*, 301 U. S. 495, 510); agreeing that any discriminatory classifications need not be

> "with mathematical nicety or because in practice it results in some inequality." (*Lindsley* v. *Natural Carbonic Gas Co. supra*)

I nevertheless query: What is the purpose of the Fourteenth Amendment if not to prevent gross, unreasonable discrimination of this kind? Both the state and federal constitutions provide for checks and balances. Our legislature has not been given carte blanche to enact any and all kinds of legislation. As stated in *Dobbins* v. *Los Angeles*, 195 U. S. 223:

> "The question in each case is whether the legislature had adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoilation of a particular class."

No legislature may in effect say

> "We make this distinction, foolish and unfair though we know it to be, because we are in the mood."

It cannot because our courts have vigilantly and consistently closed the entrance to those fertile fields of unconstitutionality, unfairness and inequality by reiterating again and again that no law may be capricious, unreasonable or arbitrary. This law, in my humble opinion, bears the stigma of all three because:

A. DISCRIMINATING BETWEEN "PERSONS SIMILARLY SITUATED"

Mr. Justice McKenna in *Ohio ex rel. Lloyd* v. *Dollison*, 194 U. S. 445, says:

> "Those contentions are that the Ohio statute denies plaintiff in error the equal protection of the law and deprives him of liberty and property without due process of law.
>
> *"The first contention can only be sustained if the statute treat plaintiff in error differently from what it does others who are in the same situation as he. That is, in the same relation to the purpose of the statute."* (Emphasis ours)

Our own Michigan Supreme Court in *People* v. *Case*, 153 Mich. 98, 116 N. W. 558, quoting from a Colorado decision, puts its stamp of approval on the constitutionality of an ordinance because it

> "does not operate as a discrimination between different licensees. It applies equally to everyone of that class, * * *"

(Note: The Michigan law cannot pass this test of constitutionality.)

See also *State ex rel. Galle* v. *New Orleans*, 67 L.R.A. 76 where the court said:

> "Ordinances must be general in their character, and operate equally upon all persons within the municipality of the same class, to whom they relate."

In *Watson* v. *Maryland*, 218 U. S. 173, we read:

> "The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive *and apply equally to all persons similarly situated.*" (Emphasis ours.)

In the case at bar the Michigan Supreme Court boldly admits that this act discriminates between male and female licensees. In *Fiztpatrick* v. *Liquor Control Commission,* 25 N. W. 2d 118, 316 Mich. 83, the court at page 91 said:

> "Plaintiffs claim (and it must be admitted) that in so doing the legislature has discriminated between male and female licensees, as to who may act as bartenders."

Briefly that proviso permits the male owner, his wife and daughter, to act as bartenders in his business,

BUT denies the same privilege to both the female owner and her daughter.

If this is not an instance of unjust discrimination against persons similarly situated in the same business, in the same relation to the purpose of the statute and in the same class it would be difficult to find one.

B. IT DENIES PLAINTIFFS EQUAL PROTECTION OF THE LAWS

Let us review the admitted facts. According to the bill of complaint this is not a new venture for Mrs. Goesaert. She is not just now going into the liquor business under this new law. She started business, bought property, and incurred obligations under a law that permitted her to do exactly what her license said she could do—own and operate a business.

I accept the well known rule of law that a license to sell liquor is not a property right but a privilege; (*Glicker* v. *Michigan Liquor Control Commission,* 160 F. 2d 96) but here the question is not whether this woman will be granted a license. The issue is, having granted her a license can

the legislature arbitrarily and unreasonably change the rules in the middle of the game as against her alone because she happens to be a woman licensee.

In this connection it must be remembered that Michigan's liquor law, 18:990 Mich. Stat. Ann., subsection 15, provides that one owning a liquor license, even in a community where the number of licensees operating exceeds the legal quota, may have his or her license renewed each succeeding year, and licenses almost automatically continue from year to year. Even quota restrictions do not prevail if such license was held before May 1, 1945. Plaintiff, Goesaert, did have such a license and evidently the legislature recognized in this privilege a property right that should not be restricted or removed. Still, while refusing to change the rules as unfair in one section of the act, in the succeeding section the legislature makes the debated change that has abridged her property rights immeasurably

Where is the "equal protection" for her?

Under this act a woman whose husband, a male licensee, has just died, finds herself at an added disadvantage. She not only has lost her husband, but neither she nor her daughter may help run the family business as they did when the main breadwinner was alive. Across the street her male competitor may permit his wife and daughter to run his business even if he works in a factory miles away.

Has not this woman by every test of reasoning been deprived of the equal protection of the laws?

One's sense of fair play and justice rebels and it is not strange that in validating the constitutionality of this act in the *Fitzpatrick* case, supra, the court found it expedient

to recall Justice Cooley's admonition in "Constitutional Limitations," viz., that courts cannot

> "run a race of right, reason, and expediency with the legislative branch of the state government."

But to this I feel impelled to add an extract from *Liggett Co. v. Baldridge,* 278 U. S. 105—

> "A state cannot, *'under the guise of protecting the public,* arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' " (Emphasis ours.)

C. THE LAW IS "PALPABLY ARBITRARY, CAPRICIOUS AND UNREASONABLE"

Lindsley v. National Carbonic Gas Co., (supra) cited by my colleagues, and a widely quoted case, holds that the constitutionality of any legislative enactment may be attacked

> "when it is without any reasonable basis and therefore is purely arbitrary."

And further that

> "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

This law can be upheld then only if it is not arbitrary and unreasonable under any set of facts that can reasonably be conceived. Well, what facts can those be? The majority opinion seeks to enumerate by stating that the legislature might have had in mind, to-wit:

> "* * * that a grave social problem * * * would be mitigated to the vanishing point in those places where there was a male licensee ultimately responsible for the condition and the decorum maintained in his establishment."

What has been the 14 years' experience of the Liquor Commission on that point? Have there been more, or less, violations where the licensee was a woman acting as her own bartender, as compared to licenses held by males? Has the "decorum" been better or worse?

Another suggested conceivable fact

> "* * * the self interest of male licensees in protecting the immediate members of their families would generally insure a more wholesome atmosphere in such establishments."

What has been the experience here? Would not a widow, for example, with a valuable license be more determined than a male licensee in protecting her family and livelihood? Is a father more interested in assuring a "wholesome atmosphere" than a mother?

Further, that the legislature

> "may also have considered the likelihood that a male licensee could provide protection for his wife or daughter that would be beyond the capacity of a woman licensee * * *"

But it must be remembered that no male adult is required to be present when the wife or daughter is bartender. In fact it is common knowledge that there are many male licensees who have other jobs, helping out only in the bar, daytimes, if working nights, or at night when working daytime. Surely the wife or daughter of a male licensee is just as subject to the perils of her employment, in the absence of her husband or father, as the female licensee or her daughter. Has not the female licensee provided protection to herself and daughter in the past?

We are immediately challenged that this goes to the wisdom of the legislature and we agree that the wisdom of what the legislature has done is not the issue. This goes beyond the "wisdom," and we have searched in vain for the faintest semblance of facts that can be "reasonably conceived" to bolster this admittedly discriminatory legislation.

Nor can its enactment be logically defended on the theory that the police power is an inherent right of legislatures in matters of public health, safety, and morals. It is still necessary that the distinction be reasonably related to the object of the legislation; (*Rapid Transit Corp.* v. *New York,* 303 U. S. 578) and in holding an ordinance which prohibited sale of liquor in dry goods stores unconstitutional (*Chicago* v. *Netcher,* 483 Ill. 104) the court said:

> "The restriction is purely arbitrary, not having any connection with and not tending in any way towards the protection of, the public against the evils arising from the sale of intoxicating liquor."

Can it be contended that it promotes public *safety* to permit only women to act as bartenders who happen to be the wife or daughter of the male owner of the business while neither the woman who owns her own license nor her daughter can so act?

Can it be contended that a woman bartender would promote the *morals* of an establishment if her husband or her father were the licensee more than if she or her mother held the license?

And is it claimed that the male owner is more solicitous of sanitation or *public health* than the female?

On all three points, safety, morals, and health, would not the contrary be more likely to exist?

SOMETHING NEW?

My colleagues cite as "persuasive" but not "controlling" the Michigan decision in *Fitzpatrick* v. *Liquor Control Commission,* supra. Let us examine two citations given therein.

On page 124 (N.W.) it refers to Section 5363 of the Michigan Compiled Laws, 1897, to-wit—

> "That this act shall not be so construed as to prevent the wife or other females who are bona fide members of the family of a proprietor of a saloon from tending bar or serving liquors in his saloon."

This may well be the fount from which the present provision in our law drew the breath of life so further analysis is interesting. The words "in HIS saloon" are significant. Seldom if ever fifty years ago were women granted licenses to sell liquor. As a matter of fact women were not frequenters of bars or saloons. There was an ingenious subterfuge labeled "family entrance" but comparatively few women availed themselves of that means of seeking refreshments. Today there is no such prohibtion affecting women. They can and are licensees, and can and do frequent places where liquor is sold. The 1897 law has no application.

The second citation refers to the *California ordinance, People* v. *Jamnez,* 49 Cal. App. 2d Supp. 739, 121 Pacific 2d, 543, 544, claimed by our Michigan Supreme Court to be a "case quite in point with the case at bar." We quote

> "The provisions of this section shall not apply to the mixing of alcoholic beverages * * * *by any on-sale licensee* nor to the mixing of such beverages *by the wife of any licensee* on the premises for which her husband holds an on-sale license." (Emphasis ours.)

Obviously in California a woman may also be a licensee and it is worthy of note that in California, if a woman is the licensee SHE MAY act as bartender to the same extent as the wife of the male licensee. We agree that the case is in point but for plaintiffs—not defendant.

Not only California but other states having similar legislation have carefully avoided writing in any liquor prohibition that places women in different categories.

Many of these "similar laws" are cited in defendant's brief but I find upon scrutiny that by inference at least, all favor plantiffs and not defendant.

In *Cronin* v. *Adams,* 192 U. S. 108, a case relating to the constitutionality of a Denver ordinance, we find that women —ALL WOMEN including the wife and female children of the owner—were prohibited from entering any saloon.

In People v. *Case,* supra, the Flint ordinance barred women—ALL WOMEN—from being in or about the bar.

In *City of Hoboken* v. *Goodman,* 68 N.J.L. 217, 51 Atl. 1092, the ordinance in question is very significant. It prevented any female from acting as bartender unless she was the wife of the owner OR OWNED THE BUSINESS HERSELF.

The California Statutes (*Deering's California General Laws,* Vol. 2, Act 3796, Sec. 56.4 page 1413) also exempted from the class prohibited the wife of the owner AND THE OWNER HERSELF.

In *Nelson, Chief of Police* v. *State, ex rel. Gross,* 26 So. (2d) 60, the prohibition was against ALL WOMEN—no exceptions.

Does it mean nothing that all states passing similar laws have avoided drawing the distinctions between women bartenders that Michigan has?

Can it be that members of the legislatures of those states are less solicitous of their women folks than Michigian? Or has "chivalry" (*Fitzpatrick* case, supra) returned to the Michigan legislature alone among our forty-eight states?

SECOND

Plaintiffs Should Be Permitted To Present Evidence

Under subdivision C of the first section, I ask what the experience of the Liquor Control Commission has been on those certain suggested facts that could reasonably "be conceived" to substantiate the law. This is in line with accepted decisions such as *Borden's Co.* v. *Baldwin*, 293 U. S. 194, wherein Mr. Justice Stone and Mr. Justice Cordozo, concurring, said:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

The same rule of equity is followed in *Polk Co.* v. *Glover*, 105 U. S. 5; *Gibbs* v. *Buck*, 307 U. S. 66; *Franklin Tp. in Somerset County, N. J.* v. *Tugwell*, 85 F. 2d 208; and a very able but dissenting opinion by Justice Hughes—*Moorehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587.

Plaintiffs herein specifically charge that the law is arbitrary and our courts are unanimous that they should have an opportunity to prove their case. On the other hand, if we refuse to continue the injunction to hear what proofs they may have the damage to their business will have been done before any action on appeal can be taken. In any event, plaintiffs should be permitted to develop the factual situation.

THE GLICKER CASE

Before concluding I again refer to *Glicker* v. *Michigan Liquor Commission,* supra. While the issue there was different there is much in common between these two cases and such substance in the *Glicker* case that can be applied here.

For example on page 99 we find—

> In *Hartford Steam Boiler Inspection & Insurance Company* v. *Harrison,* 301 U. S. 459, 57 S. Ct. 838, 839, 81 L. Ed. 1223, the Court pointed out that while the Fourteenth Amendment allows reasonable classification of persons, yet it forbids unreasonable or arbitrary classification or treatment, and * * * the rights of all persons must rest upon the same rule under similar circumstances * * *. In *Sunday Lake Iron Company* v. *Township of Wakefield,* 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154, the Court said at page 352 of 247 U. S. at page 495 of 38 S. Ct. 62 L. Ed. 1154—'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against INTENTIONAL AND ARBITRARY DISCRIMINATION, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' (Emphasis added.) * * * *Snowden* v. *Hughes,* supra, 321 U. S. 1, at page 8, 64 S. Ct. 397, at page 401, 88 L. Ed. 497, 'The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection UNLESS THERE IS SHOWN TO BE PRESENT IN IT AN ELEMENT OF INTENTIONAL OR PURPOSEFUL DISCRIMINATION.' (Emphasis added.)

The above could have been written for this case.

CONCLUSION

For the reasons given and because I firmly believe that if this court endorses this type of discriminating legislation it opens the door for further fine "distinctions" that will eventually be applied to religion, education, politics and even nationalities, I must dissent.

Dated: November 20th, 1947.

Frank A. Picard,
United States District Judge.

ARGUMENT

It is appellants' contention that appellees' Statement as to Jurisdiction and Motion to Dismiss or Affirm are based upon a misapprehension of the law in reference to Motions to Dismiss or Affirm. Their citations and argument go to the merits of the controversy rather than to the question of Jurisdiction of this Court.

In the case of *Benjamin D. Whitney,* Plf. in Error, vs. *Alexander H. Cook,* et al., 99 U. S. 607, 25 L. Ed. 446, this Court said:

> "Our amended Rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal."

In the case at bar, the Court of Three Judges accepted Jurisdiction of the controversy. Nowhere in the majority opinion denying the relief prayed for by appellants is there any statement which leads to any color of right to a dismissal of appellants' appeal on the ground of Jurisdiction or that the questions involved are unsubstantial.

In fact, the opinions of the Three Judges' Court supra shows clearly that the questions involved are very substantial ones. Majority decision denies the relief prayed for by plaintiffs and appellants but not on the grounds relied upon by appellees in their motion.

The dissenting opinion of the Honorable Frank A. Picard, supra, very definitely demonstrates the fact that the questions involved are serious and substantial.

In the case of *John Foster, Plf. in error,* vs. *State of Kansas, ex rel.,* 112 U. S. 205, 28 L. Ed. 696, this Court said:

> "As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the court, we have jurisdiction, *and the motion to dismiss must be overruled*; but, as every one of the questions which we are asked to consider has been already settled in this court, the motion to affirm is granted."

In the case at bar, the right to appeal is granted by the Statutes, supra, the lower Court has granted the appeal, and this Court therefore has jurisdiction. Appellants respectfully contend that the questions which they raise have not been previously considered by this Court, as will appear by the record.

In the case of *Joseph Davies, as Collector of Chicot County, Plaintiff in error,* vs. *United States, ex rel Austin Corbin, et al,* 113 U. S. 607, 28 L. Ed. 1149, this Court said:

> "The original rule allowing a motion to affirm to be united with a motion to dismiss was promulgated May 8, 1876, 91 U. S. VII*, and in *Whitney v. Cook,* 99 U. S. 607 (XXV, 446) decided during the October term, 1878, it was ruled that the motion to affirm could not be entertained unless there appeared on the record, at least some color of right to a dismissal. This practice has been steadily adhered to ever since, and, in our opinion, prevents our entertaining the motion to affirm in this case."

In the case at bar, it is plaintiffs' contention that the questions raised by them cannot be decided upon the motion to dismiss or affirm filed by defendants and appellees. The record will show that there is no color of right to a dismissal. The argument and citations of defendants in support of their motion go to the merits of the controversy. The plaintiffs claim that the State statute complained of is unconstitutional in that it is repugnant to Section 1 of the

14th Amendment to the Constitution of the United States; they set forth ten grounds or reasons for their claim. This appeal is brought to this Court in pursuance of Section 380, Title 28, of the Judicial Code and Judiciary of the United States Code (Judicial Code, Section 266, amended,) which provides for a direct appeal to this Court. The trial Court granted the appeal. We respectfully submit that this Court has jurisdiction, and that the motion to dismiss should be denied.

In the case of *City of New Orleans* v. *Louisiana Construction Company, et al.*, 129 U. S. 45, 32 L. Ed. 607, this Court said:

> "The motion to dismiss is therefore denied; and as we do not think there was color for it, the motion to affirm must be denied also."

It is plaintiffs' contention that the case at bar cannot be decided upon appellees' motion to dismiss or affirm because it is necessary to go into the merits of the questions involved. This can be done only upon referring to the entire transcript.

In the case of *Pat Callan, et al* vs. *Bransford*, 139 U. S. 197, 35 L. Ed. 144, this Court said:

> "The motion papers in *Joncs* v. *The Commonwealth* No. 1594, * * * are not such that we can pass upon the motions to dismiss without referring to the transcripts on file, which we ought not be obliged to do."

The transcript of the Record will show that the plaintiffs alleged certain facts in their Amended Complaint, among which was the fact that defendants had adequate facilities to provide proper supervision and regulation of the sale of alcoholic beverages without the Act complained

of. Another fact alleged that the liquor traffic in Michigan was being fully regulated by previous statutes and rules and regulations of the defendants. The defendants filed a motion to dismiss, without an answer to the plaintiffs' complaints. Under the adjudicated cases of the Michigan Supreme Court, on a motion to dismiss, all properly pleaded allegations of fact contained in the plaintiffs' complaint, must be taken as true. We therefore contend that defendants in the case at bar may not be heard to argue upon the merits of the controversy touching upon any of the facts properly alleged in the plaintiffs' complaints and amended complaints. The transcript will show that upon the hearing before the Three Judges' Court, defendants' counsel admitted the facts, and said,

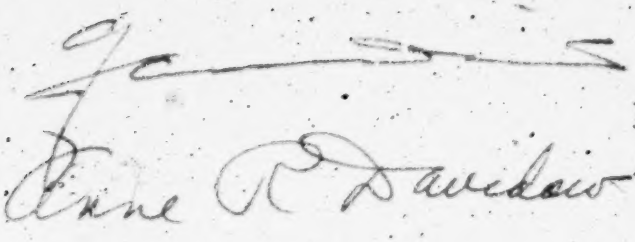
> "We have no such answer prepared, your Honor, although I am willing to stipulate that the facts are as alleged in both bills of complaint and we have before this Court merely a question of law. In other words, we admit their particular capacity to sue and theory on which suit was instituted."

In the case of *Sterling* v. *Constantin*, 287 U. S. 391; 77 L. Ed. 375, Mr. Chief Justice Hughes, on page 383, L. Ed., said:

> "As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. (Citing cases). The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." (Citing cases). (Emphasis ours.)

Plaintiffs and appellants respectfully submit that this Court has jurisdiction to entertain their appeal in pursuance of the Federal statutes (supra); that the questions involved are substantial; that the questions have not previously been passed upon by this Court; that there is no color of right for the defendants' motion to dismiss and therefore the motion to dismiss or affirm should be denied.

Respectfully submitted,



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Supreme Court of The United States

October Term, 1948

49

No. 49

VALENTINE GOESAERT, MARGARET GOESAERT, GERTRUDE NADROSKI and CAROLINE McMAHON,
Appellants,

vs.

OWEN J. CLEARY, FELIX H. H. FLYNN and G. MENNAN WILLIAMS, Members of the Liquor Control Commission of the State of Michigan, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF OF APPELLANTS

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The Legal Chronicle, 525 Woodward, Detroit 26, Mich.—CA. 1937

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B. The opinions of the three Judges' Court in the United States District Court for the Eastern District of Michigan, Southern Division are reported in: Goesaert vs. Cleary, 74 F. Supp. 735 (1947).

C. The jurisdiction of this Court is invoked under Section 380, Title 28 of the Judicial Code and Judiciary of the United States Code (Judicial Code, Section 266, amended.)

The statement as to jurisdiction of this Court and brief in support thereof, was printed and submitted to this Court. It was considered by the Court and probable jurisdiction noted.

The case was transferred to the summary docket.

D. CONCISE STATEMENT OF THE CASE

(Numerical References in parentheses are references to printed Record, unless otherwise noted)

Plaintiffs are female bar owners who act as barmaids in their own establishments, daughters of female bar owners who work in the bars owned by their mothers, and female bartenders (barmaids) who are employed by male and female bar owners (2, 9, 18-39).

Defendants are the members of the Liquor Control Commission of Michigan (1).

The suits were instituted under Title 28, Section 41, Subdivision 1, of the Judicial Code and Judiciary of the United States Code Annotated, because the actions arise under the Constitution of the United States, Section 1 of the 14th Amendment to the Constitution of the United States, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00 (1, 8).

The actions were brought in the names of the plaintiffs and persons similarly situated and were consolidated for the purpose of the hearing and appeal (2, 8, 9, 18-39, 59-76).

Plaintiffs allege that Section 19(a) of the Liquor Control Act of Michigan, which was added by Act 133 of the Public Acts of Michigan 1945, was and is a violation of the 14th Amendment, Section 1, of the Constitution of the United States (4-6, 11-13).

Section 19(a) of the Liquor Control Act of Michigan, which was added by Act 133 of the Public Acts of Michigan, 1945, provides (9-10):

> "No person shall act as bartender in any establishment licensed under this act to sell alcoholic liquor for

consumption on the premises in any city now or hereafter having a population of 50,000 or more, unless such person shall be licensed by the commission under the provisions of this section: Provided, That the commission may adopt rules and regulations governing the licensing of bartenders in other political subdivisions of the state. Such licenses shall expire on the thirtieth day of April following the issuance thereof. An annual license fee of $2.00 shall be paid by each applicant, which shall be credited to the general fund of the state. Each applicant for license shall be a male person 21 years or over, shall submit a certificate from his local board of health or health officer showing that such person is not affected with any infectious or communicable disease, and shall meet the requirements of the commission; Provided, That the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish. A license issued under the provisions of this section may be revoked or suspended by the commission in case the licensee shall drink on duty or shall violate the rules and regulations of the commission. In case of the refusal to issue or the revocation or suspension of a license by the commission, the person aggrieved shall be entitled to a hearing before the commission. The findings of the commission at such hearing shall be final as to questions of fact. The commission shall issue to each licensee an identification card to which shall be attached a photograph of the licensee. Such identification card shall be carried by the licensee at all times while on duty and shall be shown by such licensee on request. For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar."

All of the plaintiffs are citizens of the United States and citizens of the State of Michigan. All reside in Dearborn, Michigan, except two who live in Detroit and work in bars in Dearborn (1, 8, 18-39).

The City of Dearborn has a population in excess of 50,000 according to the last Federal census (3, 10).

Plaintiffs, bar owners, allege that they have large sums of money invested in their businesses; plaintiffs, bartenders, allege they are dependent upon their occupation as barmaids for their livelihood; that the enforcement of the act complained of will deprive them of their property and will result in immediate and irreparable injury to them (2-5, 9-12, 18-39).

An order was entered by the Honorable Theodore Levin, United States District Judge, convening a Court of three judges to hear the application of the plaintiffs for an interlocutory injunction, which contained a temporary restraining order, restraining the defendants from enforcing the provisions of Section 19(a) of the Liquor Control Act of Michigan which was added by Act 133 of the Public Acts of Michigan 1945 (14-15).

Defendants filed motions to dismiss the plaintiffs' complaints for the reasons that the Court had no jurisdiction over the subject matter and the plaintiffs had failed to state a claim upon which relief could be granted (16).

The hearing on the application for an interlocutory injunction was adjourned by consent of counsel to September 9, 1947 (17-18), and came on to be heard before the Honorable Charles C. Simons of the United States Circuit Court of Appeals, 6th Circuit, Honorable Theodore Levin, and Frank A. Picard, United States District Judges, the Court of three judges, on that day.

Upon colloquy between the Court and counsel for the respective parties, Defendants stated they had no answers prepared, and stipulated that the facts were as alleged in Plaintiffs' Bills of Complaint. They admitted plaintiffs'

capacity to sue and the theory upon which suit was instituted (41).

Under these circumstances, it was agreed that there would be no difference in procedure on the petition for temporary and prayer for permanent injunction (41). Counsel for the respective parties then presented their arguments to the Court (41-58).

The majority opinion of the Court was signed by Hon. Theodore Levin and concurred in by Hon. Charles Simons (59-64).

Hon. Frank A. Picard filed his dissenting opinion (65-74).

A final order, denying plaintiffs' application for an injunction and dismissing plaintiffs' complaints, was signed and filed. Plaintiffs made application for a Restraining order pending an appeal to this Court. There being no objection, the lower court added a restraining provision in said final order (74-75).

E. SPECIFICATION OF ASSIGNED ERRORS

Plaintiffs claim that manifest error intervened to the prejudice of the appellants, to-wit:

1. The Court erred in not finding that the provision of Act 133 of the Public Acts of the State of Michigan for 1945, Michigan Statutes Annotated, Sec. 18.990(1) setting up the standard of 50,000 population according to the last Federal Census, was an arbitrary and unreasonable classification.

2. The Court erred in not finding that the provisions of the said Act 133 of the Public Acts of the State of Michigan for 1945 was unjust and unfair classification as to sex.

3. The Court erred in not finding that the classification in said Act limiting the registration of bartenders to "male persons and wives and daughters of male owners" was an unfair discrimination against women owners of bars.

4. The Court erred in not finding that the classification in said Act limiting the registration of bartenders to "male persons and wives and daughters of male owners" was an unfair discrimination against women bartenders.

5. The Court erred in not finding that the classification in said Act limiting the registration of bartenders to "male persons and wives and daughters of male owners" was an unfair discrimination against daughters of female owners.

6. The Court erred in not finding that the classification in said Act limiting the registration of bartenders to "male persons and wives and daughters of male owners" was an unfair discrimination between waitresses and female bartenders.

7. The Court erred in not finding that Section 19(a) of said Act, added by Act 133 Public Acts of Michigan of 1945, is repugnant to the Fourteenth Amendment to the Constitution of the United States, in that it creates an unreasonable and arbitrary classification, and denies the plaintiffs of the equal protection of the laws.

8. The Court erred in relying on conjecture and supposition as to the reasons for the action by the Michigan Legislature in enacting said Act.

9. The Court erred in not accepting plaintiffs' allegations of fact as true, in view of defendants' Motion to Dismiss.

10. The Court erred in assuming facts without the taking of testimony.

11. The decree dismissing plaintiffs' Amended Complaints is contrary to law.

F. ARGUMENT

Assignment of Error No. 1 (79)

The Lower Court erred in not finding that the provision of Act 133, Public Acts of Michigan for 1945 (Sec. 18.990 (1) Michigan Statutes Annotated), setting up the standard of 50,000 population was an arbitrary and unreasonable classification.

The Act complained of provides at the outset, "No person shall act as bartender in any establishment licensed under this act to sell alcoholic liquor for consumption on the premises in any city now or hereafter having a population of 50,000 or more, unless such person shall be licensed by the commission under the provisions of this section: * * *"

The City of Dearborn joins the City of Detroit at the western boundary of Detroit. It has a population in excess of fifty thousand persons. Plaintiffs allege in their complaints that the standard of 50,000 population is an arbitrary and unreasonable one. The defendants did not file an answer, and stipulated "that the facts are as alleged in both bills of complaint" (41).

According to this Act, ANY person may mix and pour alcoholic beverages in any community having a population of less than 50,000. When that number is increased by one or more, bartenders must be licensed; and certain conditions must be fulfilled before a license may issue. "Persons" then must be "male" and 21 years of age or over, and shall submit to certain health examinations, etc. (9, 10). There is nothing in the act or title to indicate any reason for the 50,000 population standard.

The Title of the Michigan Liquor Law (Act No. 8, of the Public Acts of Michigan, 1933, Extra Session), as amended, reads:

> "AN ACT to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the incorporation of farmer cooperative wineries and the granting of certain rights and privileges thereto; to provide for the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referendum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances."

"Person" is defined by the act "to mean any person, firm, partnership, association, or corporation" (Section 2, Act 8, of the Public Acts of Michigan for 1933, Special Session—Section 18.972, Michigan Statutes Annotated).

Under the act complained of, women may be bartenders without any license in communities having a population of 50,000 or less; and, if the wife or daughter of a male owner of a bar, may obtain a license to be a bartender in cities having a greater population. But a female in any city over 50,000 population, unless a wife or daughter of a *male* ~~owner, may~~ not be a bartender.

There is nothing in the history of the exercise of the police power which justifies these provisions of this act. What magic is there in the number 50,000? Why not 5,000, or 100,000? This is not a law limiting the number of bars

to certain proportions of population; it is not a zoning law; it cannot be construed as an attempt to limit the number of bartenders, for that is controlled by the number of liquor establishments and the volume of business done in each establishment, regardless of population.

The act complained of expressly states:

> "For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar."

There is nothing in this act which has anything to say about a bartender selling liquor; it expressly limits the definition of a bartender to a person who mixes or pours alcoholic liquor behind a bar. The question then arises, what peculiar condition attaches to mixing or pouring alcoholic liquors behind a bar in cities over 50,000 population which does not exist in communities under that population? What is there about women mixing or pouring liquor behind a bar in communities over 50,000 population which should prevent their doing the same in cities over that population? Appellants contend that there is no reason whatsoever for the standard of numbers of population as the basis for being a bartender.

The allegations of fact contained in the complaints of the appellants were admitted by the defendants. The only additional facts in the case are contained in the affidavits of the barmaids (bartenders) and owners of bars, filed at the time of the hearing on the application for a temporary injunction. Many of these affidavits show that the establishments which the plaintiffs owned and where they worked were properly conducted; that no complaints had ever been made against them (18-39). All of these affidavits show that all of the plaintiffs will suffer irreparable injury if the act is enforced.

Assignment of Errors No. 2, 3, 4, 5, and 6 (79)

The appellants claim that the trial court erred in not finding that Section 19(a) of the Liquor Control Act of Michigan, which was added by Act 133 of the Public Acts of Michigan for 1945, was an unfair and unjust classification as to sex, and an unfair discrimination against women owners of liquor establishments, women bartenders, daughters of female owners of bars, and an unfair discrimination between waitresses and female bartenders.

The dissenting opinion of the Honorable Frank A. Picard, Judge of the District Court of the Eastern District of Michigan, Southern Division (65-74), supports the contention of the plaintiffs and appellants, namely, that the act is unjustly and unfairly discriminatory, and is an unreasonable classification.

The case of *Fitzpatrick vs. Liquor Control Commission*, 316 Michigan 83, 93, relied upon by the defendants in the lower Court, and which was quoted by the majority opinion of the lower Court as "persuasive," (64) did not decide the questions of discrimination herein presented; and the question of being repugnant to the Constitution of the United States was not before the State Court. In that case, the bill of complaint of the plaintiffs showed they were barmaids in the City of Detroit. They raised the question of constitutionality of the act on the basis of a violation of the Constitution of the State of Michigan. The defendants in that case filed a motion to dismiss plaintiff's complaint, which was granted. No testimony was taken and no proofs were presented.

In the decision of the Michigan Supreme Court, the discrimination is admitted, but is sought to be justified on the

und of proper exercise of police power. In so doing, the
urt based its opinion upon conjecture. There was no
of submitted from which the Court could have arrived
any such conclusion. Plaintiffs were not given an op-
tunity to present any proofs, as the lower Court decided
matter upon the motion of the defendants to dismiss,
hout any answer on the part of the defendants, or
ofs.

The law does not prohibit women from acting as wai-
sses in bars or establishments where alcoholic liquor is
d in cities having a population of 50,000 or over; it does
t prohibit waitresses from selling alcoholic liquor in such
ablishments; it does not prohibit women from serving
uor in such establishments; but it does prohibit women
om mixing or pouring liquor behind a bar in cities having
population over 50,000. The law expressly states that
or the purpose of this act, a bartender shall be construed
mean *a person who mixes or pour alcoholic liquor be-
nd a bar.*" (italics ours).

The law expressly excepts from its operation wives and
ughters of male owners "of any establishment licensed to
ll alcoholic liquor for consumption on the premises."
laintiffs claim that there is no foundation in fact or
eory upon which such discriminations and classifications
ay be maintained as a valid exercise of the police power of
State. There is no question that the State has the right
regulate and even prohibit traffic in liquor, but once
aving granted the right, then all persons are entitled to
ne equal protection of the laws in connection therewith.
ertainly all persons within the same class should receive
ne equal protection of the laws.

There is no question that the State has the right to li-
ense bartenders, but in the exercise of that right, all per-

sons having the necessary qualifications should be entitled to a license. The Liquor Control Act of Michigan defines a person as "any person, firm, partnership, association, or corporation" (Section 2, Act 8, of the Public Acts of Michigan for 1933, Special Session; Section 18.972 Michigan Statutes Annotated).

There is nothing in the law which creates any discrimination by reason of sex in the matter of licensing establishments where alcoholic liquor may be sold. Women having the necessary qualifications may obtain licenses to own and operate such establishments; but by the provisions of the complained-of amendment to the law, women may not be bartenders in their own licensed establishments; the wives and daughters of male owners of any retail liquor establishments may be licensed to be bartenders, but the daughters of female owners may not be so licensed.

As stated by Judge Picard in his dissenting opinion (65-74), the law

> "discriminates between persons similarly situated; it denies plaintiffs equal protection of the laws; and its proviso that the wife and daughter of a male licensee may act as bartender while denying the same privilege to either the female licensee or her daughter, is palpably arbitrary, capricious and unreasonable, and not based on facts that can reasonably be conceived."

We believe that Judge Picard, in his dissenting opinion, ably discusses the main issues and resolves them in favor of the plaintiffs.

He said (66-67):

> "As stated in *Dobbins v. Los Angeles*, 195 U. S. 223:
>
> 'The question in each case is whether the legislature has adopted the statute in exercise of a rea-

sonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoilation of a particular class.'

"No legislature may in effect say

'We make this distinction, foolish and unfair though we know it to be, because we are in the mood.'

It cannot—because our courts have vigilantly and consistently closed the entrance to those fertile fields of unconstitutionality, unfairness and inequality by reiterating again and again that no law may be capricious, unreasonable or arbitrary. This law, in my humble opinion, bears the stigma of all three because:

A—Discriminating Between 'Persons Similarly Situated.'

"Mr. Justice McKenna in *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, says:

'Those contentions are that the Ohio statute denies plaintiff in error the equal protection of the law and deprives him of liberty and property without due process of law.

'*The first contention can only be sustained if the statute treat plaintiff in error differently from what it does others who are in the same situation as he. That is, in the same relation to the purpose of the statute.*' (Emphasis ours.)

"Our own Michigan Supreme Court in *People v. Case*, 153 Mich. 98, 116 N. W. 558, quoting from a Colorado decision, puts its stamp of approval on the constitutionality of an ordinance because it

'does not operate as a discrimination between different licensees. It applies equally to everyone of that class * * *'

"(Note: The Michigan law cannot pass this test of constitutionality.)

"See also *State ex rel. Galle v. New Orleans*, 67 L.R.A. 76 where the court said:

> 'Ordinances must be general in their character, and operate equally upon all persons within the municipality, of the same class, to whom they relate.'

"In *Watson v. Maryland*, 218 U. S. 173, we read:

> 'The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive *and apply equally to all persons similarly situated.*' (Emphasis ours.)

"In the case at bar the Michigan Supreme Court boldly admits that this act discriminates between male and female licensees. In *Fitzpatrick v. Liquor Control Commission*, 25 N. W. 2d 118, 316 Mich. 83, the court, at page 91 said:

> 'Plaintiffs claim (and it must be admitted) that in so doing the legislature has discriminated between male and female licensees, as to who may act as bartenders.'

"Briefly that proviso permits the male owner, his wife and daughter, to act as bartenders in his business,

"But denies the same privilege to both the female owner and her daughter.

"If this is not an instance of unjust discrimination against persons similarly situated in the same business, in the same relation to the purpose of the statute and in the same class it would be difficult to find one."

In the case of *Glicker vs. Michigan Liquor Control Commission*, 160 F (2)96, (6 Circuit), the Court upheld the contention of the plaintiff that she was denied the equal protection of the laws by a rule of the Liquor Control Commission. While that case does not involve the same facts as the case at bar, nevertheless the principle of law is the

same. In that case the court pointed out that while traffic in liquor may be regulated and even prohibited in that field, laws, rules and regulations in that connection must be applied equally to all persons within that class. It was said that the action of the Liquor Control Commission could not be sustained if it were arbitrary or capricious, and that the process of law must be observed and applied equally to all persons within a class.

In the case at bar, waitresses may sell and serve liquor, but women may not mix or pour liquor behind a bar. Male owners of bars may mix and pour liquor behind a bar, but women owners may not. Wives and daughters of male owners may mix and pour liquor behind a bar, but daughters of female owners may not.

The case of *Adams vs. Tanner*, 244 U. S. 592; 61 L. Ed. 1336, was an appeal from the District Court of the United States dismissing a bill in a suit to enjoin enforcement of the employment agency law of the State of Washington. This Court, on page 1343, L. Ed. said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But it is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

The judgment of the lower court was reversed and the cause remanded for further proceedings.

In the case of *Power Manufacturing Co. vs. Saunders*, 274 U. S. 490; 71 L. Ed. 1165, this Court on page 1168, L. Ed. said:

> "The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws." (Citing cases) "It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based upon a real and substantial difference having a reasonable relation to the subject of the particular legislation." (Citing cases)
>
> "No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, *the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.*" (Italics ours).

The case of *Frost vs. Railroad Commission*, 271 U. S. 583, 70 L. Ed., 1101 involved the constitutional validity of a certain transportation act of California as construed and applied to the plaintiffs. They were engaged under a single private contract in transporting citrus fruit over the highways betwen fixed termini. They were brought before the Railroad Commission of the State for the reason that they did not secure from the Commission a certificate of public

convenience and necessity. This Court, on pages 1104 and 1105, L. Ed., said:

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

In the case of *Truax vs Corrigan*, 257 U. S. 312; 66 L. Ed., 254, this Court, on page 263 L. Ed., said:

> "But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.
>
> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this court in *Barbier v. Connolly*, 113 U. S. 27, 28, L. ed. 923, 924, 5 Sup. Ct. Rep. 357, of the equality clause, said: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, *it affects alike all persons similarly situated*, is not within the Amendment.'"

In the case at bar, all persons similarly situated are not affected alike. Not only is there discrimination between the sexes, whereby only men may be bartenders in communities having a population of over 50,000, but there is a discrimination and a subclassification made among women. The wife and daughter of a male owner may be bartenders; the daughter of a female owner may not be a bartender. A woman, in communities under 50,000 population, whether an owner of a bar or not, may be a bartender; a woman, in a community of over 50,000, may not be a bartender, even though she is a licensed owner of an establishment selling alcoholic liquor. Women may sell and serve alcoholic liquor anywhere in a bar, but women may not mix or pour liquor behind a bar.

In the case of *Liggett Co. vs. Baldridge*, 278 U. S. 104, 73 L. Ed. 204, the constitutionality of an act of the Pennsylvania legislature was brought before this Court. The act provided that every pharmacy or drugstore be owned only by a licensed pharmacist, and in the case of corporations, associations and partnerships, required that all the partners or members thereof be licensed pharmacists, with the exception that such corporations, associations, or partnerships already organized could continue as before. This Court held that the appellants' business was a property right and as such entitled to protection against state legislation in contravention of the Federal Constitution. This Court, on page 209 L. Ed., said:

> "The act under review does not deal with any of the things covered by the prior status above enumerated. It deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit

lawful occupations or impose unreasonable and unnecessary restrictions upon them;'" (Citing cases).

"In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion."

This Court held the Act unconstitutional and reversed the decree of the lower Court.

In the case at bar, the only facts are contained in the amended complaints of the plaintiffs. The defendants admitted the capacity of the plaintiffs to sue and the theory on which suit was instituted (41). Plaintiffs charged that the liquor traffic in the state was being fully regulated by previous statutes and rules and regulations of the defendants, and that the attempted classification complained of had nothing to do with the regulation of the liquor traffic in Michigan (6, 13). The occupation of bartender is a legal one which can be and is fully and completely regulated and supervised by defendants.

There is nothing in the law which gives any inkling of any reason for the provision complained of. The section clearly shows that traffic in liquor is not sought to be regulated or controlled, as the definition of "bartender" is limited "to mean a person who mixes or pours alcoholic liquor behind a bar." Women may sell and serve liquor; and some women in the favored class of wives and daughters of male

owners, or women in communities of less than 50,000 may even mix and pour liquor behind a bar.

The case of *Gibbs vs. Buck*, 306 U. S. 65; 83 L. Ed. 1111, was an appeal from the order of a three-judge court refusing to dismiss a bill of complaint on motion and granting an interlocutory injunction against enforcement of a Florida statute. The complainants are the American Society of Composers, Authors and Publishers, an unincorporated association, and various other corporations publishing musical compositions, and a number of authors and composers and next of kin of deceased authors and composers. It is a class action under equity rules. Plaintiffs attacked the constitutionality of the Florida statute. The Supreme Court held that the Court had jurisdiction in reference to the jurisdictional amount, that the members had a common and undivided interest in the matter in controversy in the class suit, and that their right consisted of the right to conduct the business of licensing the public performance of their product for copyrights. This Court said:

> "Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise 'grave doubts of the constitutionality of the Act' in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied.'"

and on pages 1118 and 1119, said:

> "It is clear that there is equitable jurisdiction to prevent irreparable injury, if the sections of the state statute outlawing the Society raise issues of constitutionality. The heavy penalties for violations and the prohibition of the issue of licenses or collection of fees show the need to protect complainants. (2) Upon the conclusion that the motion to dismiss should be over-

ruled, there was no abuse of discretion in granting an interlocutory injunction. The damage before final judgment from the enforcement of the act as shown by the affidavits would be irreparable. The allegations in the bill of threats of enforcement and the declaration in the affidavit of the Attorney General of the State, the officer charged with supervision of enforcement, of readiness and willingness 'to prosecute any violations of said act,' sufficiently establish the immediate danger from enforcement."

In the case of *Cook Coffee Co. vs. Flushing*, 267 Michigan 131, the Supreme Court of the State of Michigan, said, on page 134:

> "The constitutional provisions do not mean that there can be no classification of the application of statutes and ordinances, *but only that the classification must be based on natural distinguishing characteristics and must bear a reasonable* relation to the object of the legislation."

and on page 135:

> "Ordinances discriminating against businesses located outside of cities in favor of businesses located within cities for a given length of time are void."

The attorney for defendants at the hearing on the application for a temporary injunction admitted that he had been unable to find in his search a case directly in point where such a privilege was denied to an on-sale female licensee (53).

The Michigan statute complained of by the appellants not only calls for a discrimination of persons similarly situated, but provides for sub-classifications in a class which is not supported by fact or law.

Assignment of Error No. 7

The act complained of is repugnant to the 14th Amendment to the Constitution of the United States in that it creates an unreasonable and arbitrary classification, and denies the plaintiffs the equal protection of the laws.

In the case of *Dobbins vs. Los Angeles,* 195 U. S. 222, 49 L. Ed. 169, Mr. Justice Day on page 175 L. Ed. said:

> "'To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'
>
> "and, again, in *Holden v. Hardy,* 169 U. S. 366; 42 L. ed. 780, 18 Sup. Ct. Rep. 383, the same justice, again speaking for the court, said:
>
> "'The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.'".

In the case at bar the occupation of bartender is a legal one. The right of the state to require bartenders to be licensed is not questioned. Plaintiffs claim that they have the

right to be licensed in the same manner as all other persons similarly situated.

In the case of *Watson vs. Maryland*, 218 U. S. 172; 54 L. Ed. 987, Mr. Justice Day, on page 990, said:

> "The selection of the exempted classes was within the legitimate power, subject only to the restriction that it be not arbitrary or oppressive *and apply equally to all persons similarly situated.*"

In the case of *Brown vs. City of Miami, Florida* in the Supreme Court of Florida, decided April 15, 1947, Justice Adams, speaking for the Court, said:

> "Appellant filed a bill for a declaratory decree under Chapter 87, Fla. Stat., 1941, F. S. A., testing the validity of a municipal ordinance of the City of Miami. The ordinance reads:
>
> "'* * * no female shall be employed for the purpose of, or permitted, *to serve any liquor by the drink over any bar or counter.*' * * *" Underscoring supplied.
>
> "Appellant, a woman, alleges that she is a skilled bartender and that she will be deprived of valuable rights in the continuance of her trade if the above ordinance is valid: that subsequent to the effective date of the ordinance she entered into a contract (not shown to be in writing) with appellee Foley to work for her as a bartender in the City of Miami; that she is in doubt of her rights under the quoted ordinance.
>
> "The City moved to dismiss the bill because the contract of employment was not in writing by reason whereof she was not authorized to avail herself of the remedy chosen under this statute. The other challenge to the bill asserted the validity of the ordinance.
>
> "The chancellor dismissed the bill and on appeal we will decide the two questions presented by the motion to dismiss.

"We hold the appellant is enfitled to the remedy under Chapter 87 otherwise known as the Declaratory Decree statute. It is true her contract of employment was not in writing, nevertheless the instrument, of which she is in doubt, is the municipal ordinance which is expressly covered by the statute.

"We also hold with appellant on the second question. In a large measure the City relies on our opinion, *Nelson v. State*, — Fla. —, 26 So. 2d. 60, wherein we declined to hold the ordinance bad. For emphasis we might repeat that we declined to hold the ordinance bad as distinguished from holding it good. As was pointed out in that case, we had no female before the court contesting the issue. Then and there we served notice that in that event the question was still open.

"In our opinion this ordinance is unreasonable as applied to this appellant. It recognizes that women may frequent bars and engage in every practice as men save and except they shall not *serve liquor by the drink over the bar* notwithstanding they may mix and serve it otherwise.

"A municipality only has power to enact reasonable ordinances. See *Roach v. Ephren*, 82 Fla. 523, 90 So. 609; *Perry Trading Co. v. City of Tallahassee*, 128 Fla. 424, 174 So. 854. A lengthy dissertation on the application of this ordinance to females occupying appellant's status would serve no useful purpose in our opinion. We can see no sound reason in law to sustain the ordinance and we hold it void. It follows the decree appealed from is reversed with directions to enter a decree not inconsistent with this opinion.

"Reversed."

Judge Picard, in his dissenting opinion (65-74), eloquently stated the position of the plaintiffs. There is little that can be added to his resume of the facts, argument, and the law:

"B.—It denies Plaintiffs Equal Protection of the Laws.

"Let us review the admitted facts. According to the bill of complaint this is not a new venture for Mrs. Goesaert. She is not just now going into the liquor business under this new law. She started business, bought property, and incurred obligations under a law that permitted her to do exactly what her license said she could do—own and operate a business.

"I accept the well known rule of law that a license to sell liquor is not a property right but a privilege: *(Glicker v. Michigan Liquor Control Commission*, 160 F. 2d 96) but here the question is not whether this woman will be granted a license. The issue is, having granted her a license can the legislature arbitrarily and unreasonably change the rules in the middle of the game as against her alone because she happens to be a woman licensee.

"In this connection it must be remembered that Michigan's Liquor law, 18:990, Mich. Stat. Ann., subsection 15, provides that one owning a liquor license, even in a community where the number of licensees operating exceeds the legal quota, may have his or her license renewed each succeeding year, and licenses almost automatically continue from year to year. Even quota restrictions do not prevail if such license was held before May 1, 1945. Plaintiff, Goesaert, did have such a license and evidently the legislature recognized in this privilege a property right that should not be restricted or removed. Still, while refusing to change the rules as unfair in one section of the act, in the succeeding section the legislature makes the debated change that has abridged her property rights immeasurably.

"Where is the 'equal protection' for her?

"Under this act a woman whose husband, a male licensee, has just died, finds herself at an added disadvantage. She not only has lost her husband, but

neither she nor her daughter may help run the family business as they did when the main breadwinner was alive. Across the street her male competitor may permit his wife and daughter to run his business even if he works in a factory miles away.

"Has not this woman by every test of reasoning been deprived of the equal protection of the laws?

"One's sense of fair play and justice rebels and it is not strange that in validating the constitutionality of this act in the *Fitzpatrick* case, supra, the court found it expedient to recall Justice Cooley's admonition in 'Constitutional Limitations,' viz, that courts cannot

> 'run a race of right, reason, and expediency with the legislative branch of the state government.'

"But to this I feel impelled to add an extract from *Liggett Co. v. Baldridge*, 278 U. S. 105—

> 'A state cannot, "*under the guise of protecting the public*, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" (Emphasis ours)

"C—The Law Is 'Palpably Arbitrary, Capricious and Unreasonable'

"*Lindsley v. National Carbonic Gas Co.*, (supra) cited by my colleagues, and a widely quoted case, holds that the constitutionality of any legislative enactment may be attacked

> 'when it is without any reasonable basis and therefore is purely arbitrary.'

And further that

> 'If any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.'

This law can be upheld then only if it is not arbitrary and unreasonable under any set of facts that can reasonably be conceived. Well, what facts can those be? The majority opinion seeks to enumerate by stating that the legislature might have had in mind, to-wit?

> '* * * that a grave social problem * * * would be mitigated to the vanishing point in those places where there was a male licensee ultimately responsible for the condition and the decorum maintained in his establishment.'

"What has been the 14 years' experience of the Liquor Commission on that point? Have there been more, or less, violations where the licensee was a woman acting as her own bartender, as compared to licenses held by males? Has the 'decorum' been better or worse?

"Another suggested conceivable fact

> '* * * the self interest of male licensees in protecting the immediate members of their families would generally insure a more wholesome atmosphere in such establishments.'

"What has been the experience here? Would not a widow, for example, with a valuable license be more determined than a male licensee in protecting her family and livelihood? Is a father more interested in assuring a 'wholesome atmosphere' than a mother?

"Further that the legislature

> 'may also have considered the likelihood that a male licensee could provide protection for his wife or daughter that would be beyond the capacity of a woman licensee * * *'

"But it must be remembered that no male adult is required to be present when the wife or daughter is bartender. In fact it is common knowledge that there are many male licensees who have other jobs, helping out only in the bar, daytimes, if working nights, or at night when working daytime. Surely the wife or daugh-

ter of a male licensee is just as subject to the perils of her employment, in the absence of her husband or father, as the female licensee or her daughter. Has not the female licensee provided protection to herself and daughter in the past?

"We are immediately challenged that this goes to the wisdom of the legislature and we agree that the wisdom of what the legislature has done is not the issue. This goes beyond the 'wisdom,' and we have searched in vain for the faintest semblance of facts that can be 'reasonably conceived' to bolster this admittedly discriminatory legislation.

"Nor can its enactment be logically defended on the theory that the police power is an inherent right of legislatures in matters of public health, safety, and morals. It is still necessary that the distinction be reasonably related to the object of the legislation; (*Rapid Transit Corp. v. New York*, 303 U. S. 578) and in holding an ordinance which prohibited sale of liquor in dry goods stores unconstitutional (*Chicago v. Netcher*, 183 Ill. 104) the court said:

> 'The restriction is purely arbitrary, not having any connection with and not tending in any way towards the protection of, the public against the evils arising from the sale of intoxicating liquor.'

"Can it be contended that it promotes public *safety* to permit only women to act as bartenders who happen to be the wife or daughter of the male owner of the business while neither the woman who owns her own license nor her daughter can so act?

"Can it be contended that a woman bartender would promote the *morals* of an establishment if her husband or her father were the licensee more than if she or her mother held the license?

"And is it claimed that the male owner is more solicitous of sanitation or *public health* than the female:

"On all three points, safety, morals, and health, would not the contrary be more likely to exist?

Something New?

"My colleagues cite as 'persuasive' but 'not controlling' the Michigan decision in *Fitzpatrick v. Liquor Control Commission*, supra. Let us examine two citations given therein.

"On page 124 (N. W.) it refers to Section 5363 of the Michigan Compiled Laws, 1897, to-wit—

> 'That this act shall not be so construed as to prevent the wife or other females who are bona fide members of the family of a proprietor of a saloon from tending bar or serving liquors in his saloon.'

"This may well be the fount from which the present provision in our law drew the breath of life so further analysis is interesting. The words 'in His saloon' are significant. Seldom if ever, fifty years ago, were women granted licenses to sell liquor. As a matter of fact women were not frequenters of bars or saloons. There was an ingenious subterfuge labeled 'family entrance' but comparatively few women availed themselves of that means of seeking refreshments. Today there is no such prohibition affecting women. They can and are licensees, and can and do frequent places where liquor is sold. The 1897 law has no application.

"The second citation refers to the California ordinance, *People v. Jemnez*, 49 Ca. App. 2d Supp. 739, 121 Pacific 2d, 543, 544, claimed by our Michigan Supreme Court to be a 'case quite in point with the case at bar.' We quote:

> 'The provisions of this section shall not apply to the mixing of alcoholic beverages * * * *by any on-sale* licensee nor to the mixing of such beverages *by the wife of any licensee* on the premises for which her husband holds an on-sale license.' (Emphasis ours)

"Obviously in California a woman may also be a licensee and it is worthy of note that in California if a woman is the licensee She May act as bartender to the same extent as the wife of the male licensee. We agree that the case is in point for plaintiffs—not defendant.

"Not only California but other states having similar legislation have carefully avoided writing in any liquor prohibition that places women in different categories.

"Many of these 'similar laws' are cited in defendant's brief but I find upon scrutiny that by inference at least, all favor plaintiffs and not defendant.

"In *Cronin v. Adams*, 192 U. S. 108, a case relating to the constitutionality of a Denver ordinance, we find that women—All Women including the wife and female children of the owner—were prohibited from entering any saloon.

"In *People v. Case*, Supra, the Flint ordinance barred women—All Women—from being in or about the bar.

"In *City of Hoboken v. Goodman*, 68 N. J. L. 217; 51 Atl. 1092, the ordinance in question is very significant. It prevented any female from acting as bartender unless she was the wife of the owner Or owned The Business Herself.

"The California Statutes (Deering's California General Laws, Vol. 2, Act 3796, page 1353, Sec. 56.4 page 1413) also exempted from the class prohibited the wife of the owner And The Owner Herself.

"In *Nelson, Chief of Police v. State, ex rel, Gross*, 26 So. (2nd) 60, the prohibition was against All Women—no exceptions.

"Does it mean nothing that all states passing similar laws have avoided drawing the distinctions between women bartenders that Michigan has?

"Can it be that members of the legislatures of those states are less solicitous of their women folks than Michigan? Or has 'chivalry' (*Fitzpatrick* case supra) returned to the Michigan legislature alone among our forty-eight states?"

Assignment of Errors No. 8, 9, and 10

The appellants contend that the majority opinion of the lower Court is based upon conjecture and supposition; that the plaintiffs' allegations of fact were admitted, and should have been considered by the lower Court.

This claim is supported by the final pages of Judge Picard's dissenting opinion (72-73):

"Before concluding I again refer to *Glicker v. Michigan Liquor Commission*, supra. While the issue there was different there is much in common between these two cases and much substance in the *Glicker* case that can be applied here.

"For example, on page 99 we find—

'In *Hartford Steam Boiler Inspection & Insurance Company v. Harrison*, 301 U. S. 459, 57 S. Ct. 838, 839, 81 L. Ed. 1223, the Court pointed out that while the Fourteenth Amendment allows reasonable classification of persons, yet it forbids unreasonable or arbitrary classification or treatment, and * * * the rights of all persons must rest upon the same rule under similar circumstances * *. In *Sunday Lake Iron Company v. Township of Wakefield*, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154, the Court said at page 352 of 247 U. S., at page 495 of 38 S. Ct., 62 L. Ed. 1154—"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against Intentional And Arbitrary Discrimination, whether occasioned by ex-

press terms of a statute or by its improper execution through duly constituted against." (Emphasis added.) * * * *Snowden v. Hughes*, supra, 321 U. S. 1, at page 8, 64 S. Ct. 397, at page 401, 88 L. Ed. 497, "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection Unless There Is Shown To Be Present In It An Element Of Intentional Or Purposeful Discrimination."' (Emphasis added.)

"The above could have been written for this case."

The facts in the case at bar were admitted by the defendants. The legislation complained of shows no reason or excuse for the discrimination and classification. The purpose of the Liquor Control Act is to control the liquor traffic in the State of Michigan. It is alleged and admitted that the liquor traffic is adequately controlled and regulated by previous statutes and rules and regulations of the defendants (6, 13).

It is a well recognized rule of law in Michigan, enunciated by the Supreme Court of Michigan in many cases, that for the purpose of a motion to dismiss, the material allegations of fact contained in a plaintiff's complaint must be taken as true.

Powers vs. Fisher, 279 Mich. 442.

Skutt vs. City of Grand Rapids, 275 Mich. 258.

Goodfellow vs. Detroit Civil Service Commission, 312 Mich. 226.

Farrell vs. Unemployment Compensation Commission, 317 Mich. 676.

In the case of *Gilmer vs. Miller*, 319 Mich. 136, Chief Justice Carr on page 138 said:

> "In determining the question presented on the appeal, the material allegations of fact properly pleaded in the declaration and inferences to be drawn therefrom must be taken as true and construed in the light most favorable to plaintiffs." (Citing cases)

The majority opinion of the lower Court not only disregarded the admitted facts, but posited its decision upon conjecture and supposition not supported by the record.

One of the suppositions was that "it is conceivable that the Legislature was of the opinion that a grave social problem existed because of the presence of female bartenders in places where liquor was served in the larger cities of Michigan" (62).

Again we wish to call this Court's attention to the fact that women are not prohibited from selling and serving liquor in the very same places where they are forbidden to mix and pour liquor. Wives and daughters of *male* owners may mix and pour liquor behind a bar, while female owners and their daughters are prohibited from so doing.

What "grave social problem" is being eliminated under the above circumstances? How can a female bartender, mixing and pouring drinks behind a bar constitute a social problem which is eliminated by a male mixing and pouring liquor, behind a bar, which women sell and serve in the same establishment? Plaintiffs fail to see the logic of such contentions.

The lower court majority opinion conjectured that the Legislature may have deemed it necessary to have a male licensee responsible and male control (63).

The act is completely devoid of anything upon which such a conjecture may be predicated. There is nothing in the law which provides that a male licensee must be on the premises where women work as waitresses and sell and serve liquor.

There is nothing in the law which requires a male licensee to remain in control where his wife and/or daughter are bartenders.

There is nothing in the law which limits the activity of the licensed bartender to any particular establishment. The proviso of the act says: "the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consupmtion on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish."

A wife or daughter of a male owner could be licensed as a bartender and could work anywhere she wished. There is nothing in the law to restrict her to the establishment owned by her husband or father.

ASSIGNMENT OF ERROR NO. 11

The decision of the lower Court in dismissing plaintiffs' complaints is contrary to the law.

Plaintiffs contend that the action of the Legislature in adopting the act complained of in the case at bar was not a valid exercise of its police power.

Corpus Juris defines police power as follows (12 C. J. 904):

> "Police power is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals and general welfare of society."

and on page 928 of 12 C. J., we find:

> "The federal government, therefore, is paramount within the scope of the powers conferred on it by the constitution; and a state statute enacted in pursuance of the police power is void if in contravention of any express provision of the Federal Constitution."

This Court has on innumerable occasions accepted this definition of police power.

In the case of *Ohio Ex Rel Lloyd v. Dollison*, 194 U. S. 445, reported in 48 L. Ed. 1063, Mr. Justice McKenna, on page 1065, said:

> "Those contentions are that the Ohio statute denies plaintiff in error the equal protection of the law, and deprives him of liberty and property without due process of law.
>
> "*The first contention can only be sustained if the statute treats plaintiff in error differently from what it does others who are in the same situation as he—that is, in the same relation to the purpose of the statute.*" (Italics ours)

In the case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 539, 46 L. Ed. 679, Mr. Justice Harlan, on page 689, said:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwith-

standing, a statute of a state, even when avowedly enacted in the exercise of its police power, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden*, 9 Wheat. 1, 210; 6 L. Ed. 243, 247; *Missouri M. & T. R. Co. v. Huber*, 169 U. S. 613, 626; 42 L. Ed. 878, 18 Sup. Ct. Rep. 488.

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined as the decisions of this Court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means '*that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.*'" (citing cases)

In the case at bar, defendants have admitted the facts alleged in the plaintiffs' Amended Complaints and rely upon the State's police power for the constitutionality of the act. There is no question but that there is discrimination between persons in the same classification. Some of

the plaintiffs are licensed bar owners. Admittedly they have large sums of money invested in their businesses. Admittedly they will either have to close their places of business or hire male bartenders. In either event, they will lose their investments of years of work and savings. Some of the plaintiffs are barmaids. Admittedly they will lose their jobs and be deprived of their means of livelihood (4, 12, 18-39, 41).

Plaintiffs contend that the legislation they complain of in the case at bar is not only discriminatory but is an arbitrary and unjustifiable attempt at classification within a classification, which results in a denial of the equal protection of the laws to them and deprives them of their property in violation of the 14th Amendment to the Constitution of the United States.

CONCLUSION

Plaintiffs respectfully submit that the act complained of is a violation of the 14th Amendment to the Constitution of the United States. It is discriminatory without any basis for discrimination. The act itself outlines no reason or justification for the discrimination. The purposes are covered by the general purpose of the act to control and regulate liquor traffic in Michigan. We contend that the mixing and pouring of alcoholic liquor behind a bar on the part of a woman who is neither the wife of a licensee nor the daughter of a male licensse has nothing whatever to do with the regulation and control of liquor traffic.

The suggestion that was made at the time of the hearing, that the Legislature might have had in mind the necessity of having a man upon the premises, is not supported by the facts because there is nothing in either the law or the

regulations of the Liquor Control Commission that requires that a man must be on the premises where liquor is dispensed or mixed and poured. There is nothing in the law or the regulations which requires that a male licensee must be on the premises.

We respectfully submit that the act complained of does arbitrarily discriminate against people in the same category and classification and that by reason thereof, the plaintiffs, being in that classification so discriminated against, have been and will be denied the equal protection of the laws and will be deprived of their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Respectfully submitted,
Anne R. Davidow,
Attorney for Plaintiffs and
Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

No. ~~780~~ 49

VALENTINE GOESAERT, MARGARET GOESAERT, GERTRUDE NADROSKE AND CAROLINE McMAHON,
Appellants,

vs.

OWEN J. CLEARY, FELIX H. H. FLYNN AND G. MENNAN WILLIAMS, MEMBERS OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EUGENE F. BLACK,
Attorney General of Michigan;
EDMUND E. SHEPHERD,
Solicitor General of Michigan;
DANIEL J. O'HARA,
CHARLES A. MARTIN,
Assistant Attorneys General of Michigan,
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UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 6618

VALENTINE GOESAERT, ET AL.,
Plaintiffs,

vs.

OWEN J. CLEARY, ET AL.,
Defendants

Civil Action No. 6619

GERTRUDE NADROSKE, ET AL.,
Plaintiffs,

vs.

OWEN J. CLEARY, ET AL.,
Defendants

APPELLEES' STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to appellants' statement as to jurisdiction. Appellees include herein their motion to dismiss the appeal, or in the alterna-

tive, to affirm the judgment of the District Court on the ground that the questions raised on behalf of appellants are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, appellees assert that the unsubstantial character of the grounds stated by appellants is so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters here relied upon by appellees are more particularly stated below:

First: At the November election 1932 the people of Michigan ratified a proposed amendment to article 16, section 11 of the State Constitution, thereby repealed the liquor prohibition amendment of 1916 and provided in substance that the legislature might by law create a Liquor Control Commission who, subject to statutory limitations, should exercise complete control of the alcoholic beverage traffic within the State, including the retail sales thereof.

The Michigan Liquor Control Act of 1933 [1] created such a commission which, under an unbroken line of decisions of the State Supreme Court construing both the constitutional amendment and this statute,

Fitzpatrick v. *Liquor Control Commission*, 316 Mich. 83, and cases cited, 90,

became vested by the Constitution with plenary power to control the alcoholic beverage traffic, such power being subject to express statutory provisions or necessary implica-

[1] Act No. 3, Pub. Acts 1933, Ex. Sess., effective Dec. 15, 1933; Comp. laws Supp. 1935, §§ 9209-16 to 9209-72; Stat. Ann. §§ 18.971 to 18.1028. It may be noted that meanwhile, between the date of ratification of the constitutional amendment of 1932 and the effective date of the present law, Act No. 64, Pub. Acts 1933, effective April 27, functioned as a stop-gap measure.

tions limiting the exercise thereof that the legislature is empowered by the Constitution to enact.

Section 19a of the Liquor Control Act, the constitutional validity of which is attacked by the appellants, was added thereto by Act No. 133, Pub. Acts 1945 and given immediate effect on the 30th day of April.

Boiled down to its substance, and as construed by the Michigan Supreme Court in *Fitzpatrick, supra,* 316 Mich. at 89, "the foregoing section 19a limits the licensing of female bartenders to the wife and daughters of the male owner of a licensed liquor establishment." By it appellants are excluded from obtaining bartenders' licenses; and here, as in the case of Fitzpatrick, "they claim that this section is unconstitutional, that it bears no reasonable relation to the object of the legislation, that it is discriminatory as to them, class legislation, therefore, void."

On December 2, 1946, the Michigan Supreme Court, in the case of *Fitzpatrick* v. *Commission, supra,* held sec. 19a valid as against such objections. A rehearing was denied January 6, 1947, but the plaintiffs (not parties here) failed to make timely application for a writ of certiorari from the Supreme Court of the United States.

Likewise the Court in this cause, *Goesaert* v. *Cleary, et al.,* 74 Fed. Supp. 735, upheld the constitutional validity of sec. 19a of the Michigan Liquor Control Act, as against identical objections here urged.

Second: Since *Mugler* v. *Kansas,* 123 U. S. 623, the substantive power of a State to prevent the sale of intoxicating liquor has been undoubted,

Indianapolis Brewing Co. v. *Liquor Control Commission,* 305 U. S. 391, 394,

and the Supreme Court of the United States has recognized that the control of the liquor traffic is so peculiarly within the province of legislative powers that the regulation, or

even prohibitio. thereof, in many instances, does not deprive an individual of property without due process of law, or deny him equal protection of the laws,

Eberle v. *Michigan*, 232 U. S. 700.

No individual has a constitutional right to engage in the liquor business. "The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States",

Crowley v. *Christensen*, 137 U. S. 86;

cf. Cronin v. *City of Denver*, 192 U. S. 108, 114.

Third: The majority opinion of the three-judge Court in this cause rests on sound principles firmly established by the Supreme Court of the United States.

1. It is based primarily upon the foregoing doctrine of this Court that a legislature of a State under its police power has the right to regulate and even prohibit the sale of intoxicating liquors. See cases cited above and

Ziffin v. *Reeves*, 308 U. S. 132.

2. The opinion is also founded on the principle that the equal protection clause of the 14th Amendment does not prohibit all classification *per se*,

Atchison, Topeka & Santa Fe R. Co. v. *Matthews*, 174 U. S. 96.

"A long line of decisions by this Court had also settled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing. *Adams v. Mil-*

waukee, 228 U. S. 572. *Miller v. Wilson*, 236 U. S. 373, 384."

Zucht v. *King*, 260 U. S. 174, 176-177, declining jurisdiction because the constitutional question was not substantial in character.

3. It accepted and applied the standard rules laid down down by the Supreme Court of the United States for determining whether a statute is arbitrary in its classification and therefore denies the equal protection of the laws,

Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78;
Carmichael v. *So. Coal & Coke Co.*, 301 U. S. 495, 510;
New York Rapid Transit Corp. v. *City of New York*, 303 U. S. 573.

4. The opinion is also correct in applying the rule that courts are not concerned with the wisdom of legislation. As Mr. Justice Cardozo so well said when speaking for the Court:

"The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way."

Williams v. *Mayor*, 289 U. S. 36, 42.

And see,

Nebbia v. *New York*, 291 U. S. 502.

5. In overruling appellants' objection that the legislature may not deny any woman the privilege of being employed as a bartender, if the right to engage in such employment is given to any group of women, the majority opinion of the three-judge Court relied on the following principles many times asserted by the Supreme Court of the United States.

"There is no requirement that the State must extend its regulation to all cases which could be reached

and improved by appropriate legislation, in order to sustain the constitutional validity of regulations for the correction of a wrong which in its experience is indicated." Citing:

Miller v. *Wilson*, 236 U. S. 373, 384;
Bosley v. *McLaughlin*, 236 U. S. 385;
Farmers Bank v. *Federal Reserve Bank*, 262 U. S. 649, 661;
Sproles v. *Binford*, 286 U. S. 374, 396.

"When the classification in such a law (enacted in exercise of the police power) is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Lindsley v. *Natural Carbonic Gas Co., supra.*

"Indeed, it has long been the law under the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it' (citing cases) . . .".

New York Rapid Transit Corp. v. *City of New York, supra.*

And, in applying the foregoing principles, the majority of the three-judge Court found several states of fact that the legislature of Michigan could have reasonably conceived to sustain the "barmaid classification," 74 Fed. Supp. at p. 738-739, starting at foot of second column on page 738, headnotes 8-11.

Fourth: On the other hand, the dissenting opinion of the three-judge Court, 74 Fed. Supp. 740-744, spends itself in criticizing the legislative policy without citing a single decision of this Court striking down a similar law. The dissent admits that a liquor licensee had no property rights in his license to engage in that traffic and then goes on to

base a major conclusion on the statement that sec. 19a of the Michigan Liquor Control Act violates the property rights of a licensee.

Of the decisions by the Supreme Court of the United States cited in the dissenting opinion,

Ohio ex rel. Lloyd v. *Dollison*, 194 U. S. 445, held that the power of the State over the liquor traffic is such that the traffic may be absolutely prohibited, and that being so it may be prohibited conditionally and a local option law does not necessarily deny to any person equal protection of the laws;

Dobbins v. *Los Angeles*, 195 U. S. 223, declared void a municipal zoning ordinance;

Watson v. *Maryland*, 218 U. S. 173, upheld the medical registration law of Maryland as against the objection that it denied equal protection of the law because it contained a grandfather clause;

Liggett v. *Baldridge*, 278 U. S. 105, held in violation of the due process clause of the 14th Amendment, a State enactment forbidding any corporation to own a pharmacy or drug store unless all of its stockholders were licensed pharmacists.

And the cases cited by appellants as sustaining the jurisdiction of the Supreme Court,

Looney, Attorney General, v. *Crane Co.*, 245 U. S. 178;
Sterling, Governor, v. *Constantin*, 287 U. S. 378, and
Parker v. *Brown*, 317 U. S. 341,

seem to us at least rather far from the point.

In the *Looney* case, *supra*, the Court held that "neither the right of a State to attach conditions when licensing a sister state corporation to do local business, nor its power to tax the corporation in respect of such business, when licensed, can sustain impositions which, in the guise of permit charges

or excise taxes, result in direct burdens on interstate commerce or in the taxation of property beyond the confines and jurisdiction of the state."

The case of *Sterling, Governor*, v. *Constantin, supra*, the Court affirmed an order of interlocutory injunction granted by a three-judge District Court, restraining the Governor and certain military officials of Texas from enforcing military orders restricting the production of plaintiffs' oil wells, and a final decree of the same court making the injunction permanent.

And *Parker* v. *Brown, supra*, sustained the constitutional validity of the California Agricultural Prorate Act and a prorate marketing program adopted thereunder by the State for regulating the handling, disposition, and prices of raisins produced in California, a large part of which go into interstate and foreign commerce, as against the charge that such a program was rendered invalid (1) by the Sherman Act, (2) by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U. S. C. §§ 601, et seq., or (3) by the Commerce Clause of the Constitution.

Fifth: Finally, we respectfully submit, it comes down to this: seven justices of the Supreme Court of the State of Michigan unanimously agreed with a local circuit judge whose decree they affirmed on appeal, *Fitzpatrick* v. *Liquor Control Commission, supra*, that since there was a fair and substantial basis for the classification, the provision of § 19a of the Liquor Control Act, *supra*, prohibiting women, except wives or daughters of male licensees, from acting as bartenders was not an unconstitutional discrimination against women thereby barred from such occupation; the majority constituting the three-judge Federal District Court in this cause, *Goesaert* v. *Cleary, supra*, found at least four conceivable states of fact to sustain such a classification. Thus, there was one lone dissenter out of 11 jurists, 7 Michi-

gan justices, one Michigan circuit judge, and three Michigan Federal judges, and those who signed the majority opinions were guided by the foregoing decisions by the Supreme Court of the United States.

Wherefore, appellees respectfully submit this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the order and decree entered below.

Respectfully submitted,

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EDMUND E. SHEPHERD,
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Assistant Attorneys General,
Counsel for Appellees.

In the

Supreme Court of the United States

October Term, 1948

No. 49

VALENTINE GOESAERT, MARGARET GOESAERT, GERTRUDE NADROSKI and CAROLINE McMAHON,
Appellants,

v.

OWEN J. CLEARY, FELIX H. H. FLYNN and G. MENNEN WILLIAMS, Members of the Liquor Control Commission of the State of Michigan,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan

BRIEF FOR APPELLEES

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appellants' brief, p. 32, cannot be decided by the judicial department of government.[31]

Fifth:

Appellants' final contention, id., pp. 34-37, is that § 19a deprives them of their property without due process of law because it is not a valid exercise of state police power.

Our answer is that since *Mugler v. Kansas*, 123 U. 623, and to a degree since ratification of the 21st Amendment,[32] state legislatures have been free to choose absolute prohibition, liberal regulation, or rigid control (as in Michigan), as a solution of the liquor problem; and since there is no inherent, natural, or constitutional right to engage in such a business, it cannot be said that § 19a deprives the platintiffs of any vested interest.[33]

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[31]

E.g., it is urged that the lower court should have considered the alleged fact admitted for the purpose of our motion to dismiss) that the liquor traffic in Michigan is adequately controlled and regulated by previous statutes and the rules of the defendants; but this, in our humble opinion, is purely a legislative question.

[32]

Indianapolis Brewing Co. v. Mich. Liquor Control Comm., 305 U.S. 391.

[33]

Crowley v. Christensen, 137 U.S. 86, 91, and other cases cited in footnote 21.

F (a)

The Argument

Point One[34]

The requirement of § 19a of the Michigan liquor control act, that licenses must first be obtained by a person desiring to act as a bartender in any licensed establishment 'in any city nor or hereafter having a population of 50,000 or more' does not set up an arbitrary or unreasonable classification.

Section 19a of the Michigan liquor control act, added by amendment in 1945,[35] provides in part as follows:

> "No person shall act as a bartender in any establishment licensed under this act to sell alcoholic liquor for consumption on the premises in any city now or hereafter having a population of 50,000 or more, unless such person shall be licensed by the commission under the provisions of this section: *Provided*, That the commission may adopt rules and regulations governing the licensing of bartenders in other political subdivision of the state. . . . "

It is urged that this is an unreasonable and arbitrary classification; that it is not a law limiting the number of bars to certain proportions of population, nor is it a zoning

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[34] Appellants' assignment of error No. 1 (79), brief, pp. 7-9.

[35] Act No. 8, § 19a, Pub. Acts 1933, Ex. Sess., as amended by Act No. 133 Pub. Acts 1945, Mich. Stat. Ann. 1947 Cum. Supp. § 18.990-1.

law; and that no peculiar condition attaches to mixing or pouring alcoholic liquors behind a bar in cities over 50,000 population that does not exist in communities under that population. No authorities are cited in support of counsel's position, and the dissenting opinion (65-74) filed in the court below does not consider the question.

The majority opinion of the lower court rejected (60) this claim on the ground that the legislature may have reasonably concluded that the need for such a license requirement was much more urgent in the larger cities, and held that such classification is not unreasonable and repugnant to the Federal Constitution, citing as ultimate authority the decision of this Court in

Radice v. People of the State of New York, 264 U.S. 292,

upholding a New York statute[36] which prohibited the employment of women in restaurants in cities of the first and second class during the night hours.[37]

We respectfully submit that the authority of *Radice v. New York* controls the first question raised in this cause.

It is also pertinent to note that while the legislature in enacting § 19a of the liquor control act, places a statutory limitation on the commission by requiring licenses for bartenders in cities of 50,000 population or more, it does not limit the commission's power, in the exercise of its *con-*

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[36] Laws of New York, 1917, c. 535, p. 1564.

[37] This law was also sustained as against the further objection that it did not apply to female singers and performers and others enumerated.

stitutional discretion,[38] to 'adopt rules and regulations governing the licensing of bartenders in other political subdivisions of the state'.[39]

Point Two[40]

The Michigan liquor control act, § 19a, does not deny to appellants the equal protection of the laws.

The Michigan liquor control act, § 19a, added by amendment in 1945, requires of any applicant for a bartender's license, the following qualifications:

> "Each applicant for license shall be a male person 21 year or over, . . . : *Provided*, That the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish. . . . For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar".

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[38]

We invite the Court to bear constantly in mind the fact that under article 16, § 11, of the Michigan Constitution, the liquor control commission, subject to statutory limitations, exercises "complete control" of the alcoholic beverage traffic within the state.

[39]

Thus, without specific legislative sanction, the commission may require the registration of drivers and helpers of breweries, and may impose a reasonable fee upon them, Kelly v. Michigan Liquor Control Commission, 280 Mich. 693.

[40]

Question II, covering assignments of error Nos. 2, 3, 4, 5, and 6 (79), appellants' brief, p. 10-21; Question III, covering assignment of error No. 7, appellants' brief, pp. 22-31.

Challenging the constitutionality of the foregoing provisions, appellants stake out two separate claims: (1st) that § 19a was an unfair and unjust classification as to sex, an unfair discrimination against women owners of liquor establishments, women bartenders, the daughters of female owners of bars, and an unjust discrimination between waitresses and female bartenders; and (2nd) that § 19a creates an unreasonable and arbitrary classification, and denies to appellants the equal protection of the laws.

Since each challenge rests on the equal protection clause of the Fourteenth Amendment, these two questions may be consolidated and considered as one.[41]

We dispute appellants' claims on three grounds: (1) state legislation regulating or controlling the liquor traffic may, without violating rights preserved by the Fourteenth Amendment, extend the privilege of engaging in the sale of intoxicating liquors at retail, as an employer or employee, upon stricter terms than those which might be imposed upon members of a useful or ordinary calling; and in so doing, the legislature of a State may draw fine lines of distinction; (2) a *fortiori*, Michigan's liquor law creating a commission to exercise complete control of the alcoholic beverage traffic, should not be struck down by a Federal court until it appears beyond any shadow of doubt that it violates constitutional principles; and (3) the second *proviso* of § 19a of the Michigan liquor control act, exempting

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[41]

Counsel would be quick to concede that appellants are in no position to contend that the State had made a law which 'shall abridge the privileges or immunities of citizens of the United States', or that Michigan has violated article 4, § 2, of the Federal Constitution. Laws regulating traffic in liquor may not be challenged on that ground. See cases cited footnotes 15 and 16, Vol. 12 Am. Jur., Constitutional Law, § 467, pp. 126 and 127.

the wife or daughter of the male owner of a liquor establishment, from the general requirement that a licensed bartender shall be a male person, does not set up an arbitrary classification.

1

Since legislation governing the alcoholic beverage traffic falls into its own peculiar category, a State in controlling it, may draw finer lines of distinction in classification than might be permitted in regulating a useful occupation.

This Court long ago drew distinctions between the right to pursue any lawful trade or business, and the privilege of engaging in the sale of spirituous and intoxicating liquors by retail, *Mugler v. Kansas*, 123 U.S. 623. As to the latter, such business may be regulated, or may be absolutely prohibited by state legislation, without violating the Constitution or laws of the United States.

Crowley v. Christensen, 137 U.S. 86, 91.

Speaking for the Court in *Crowley v. Christensen, supra*, Mr. Justice Field said:

> "The sale of such liquors in this way (by retail) has therefore been, at all times, by the courts of every State, considered as a proper subject of legislative regulation. . . . Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privi-

lege of a citizen of the State or of a citizen of the United States. As it is a business attendant with danger to the community it may . . . be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. . . . It is a matter of legislative will only".[42]

In later years the Court upheld the validity of Michigan's local option law, Act No. 207, Pub. Acts Mich. 1889.

Eberle v. Michigan, 232 U.S. 700, 706,

noting that its early decisions[43] show that the State may prohibit the sale of liquor absolutely or conditionally, may prohibit the sale as a beverage and permit the sale for medicinal and like purpose; that it may prohibit the sale by merchants and permit the sale by licensed druggists.

The writer of the treatise, 30 Am. Jur., Intoxicating Liquors, § 39, p. 278, thus sums it up:

"In determining the constitutionality of an enactment, the court must remember that intoxicating liquor, in its nature, is dangerous to the morals, good order, health, and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life, such as corn, wheat, cotton, tobacco, potatoes, etc. Restraints and limitations upon the

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[42] Followed in Cronin v. Adams, 192 U.S. 108.

[43] Kidd v. Pearson, 128 U.S. 1; Rippy v. Texas, 193 U.S. 504; Lloyd v. Dollison, 194 U.S. 445.

liquor traffic may be upheld which might not be sustained as to callings that may be pursued as of common right".

It is significant, we think, that in her able brief, counsel for appellants cites no decision of this Court which strikes down as invalid on the ground of denial of equal protection, any state legislative enactment regulating the sale of liquor.

2

Since the people of Michigan have through their own Constitution established a system of 'complete control' over the alcoholic beverage traffic within the state, any legislative measure passed in furtherance of such a declaration of public policy, should if possible, be sustained by courts of the United States.

We have searched in vain through the dissenting opinion (65-74) in the court below, and through the brief filed by appellants in this Court, for any reference whatsoever to article 16, § 11, of the Constitution of the State of Michigan, as amended in 1932.

The problem here presented cannot be solved intelligently, nor may the legislation here challenged be clearly understood without careful consideration of the source of power exercised by the Michigan liquor control commission, nor may we ignore decisions of the Michigan court of last resort construing the language of the State Constitution.

1. Michigan's system of liquor regulation is unique in that power exercised by the administrative authority comes directly from the people through the State Constitution,

and not from the legislature; and that the Michigan liquor control act merely limits the authority of the commission.

In our counter-statement of the case, *ante*, pp. 2-5, we have set forth a brief history of Michigan liquor legislation, which need not be repeated.

Suffice it to say that in 1932, following unsatisfactory periods of local regulation and prohibition, the people of Michigan amended article 16, § 11, of the State Constitution to provide for a strong, centralized and complete control of the alcoholic beverage traffic, such power to become vested in a liquor control commission created by the legislature and subject only to 'statutory limitations'.

The legislature in 1933, implementing this constitutional mandate, enacted the Michigan liquor control act, created the liquor control commission, and provided (§ 1) in part:[43]

> "Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession, transportation and sale thereof".

This, of course, merely recognized that the source of power delegated to the commission is in the Constitution, and that the function of the legislature is to impose such limitations as it may deem proper upon the control to be exercised by the liquor control commission.[44]

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[43]

Act No. 8, § 1, Pub. Acts 1933, Ex. Sess., Comp. Laws Supp. 1935, § 9209-16, Mich. Stat. Ann. § 18.971.

[44]

Johnson v. Liquor Control Commission, 266 Mich. 682.

The highest court of the State, in construing the language of this provision of the Constitution, has held that the word 'control' means to 'regulate and govern';[45] and that the liquor control commission has inherent power, unless restricted by legislative enactment, to require the registration with it of drivers and helpers of breweries, wineries, distilleries and wholesalers,[46] or to license private clubs to sell and furnish alcoholic beverages under such rules and regulations as it may promulgate.[47]

In short, except as limited or defined by statute, the Constitution of Michigan itself vests the commission with plenary power to control the alcoholic beverage traffic in that State, as appears from the provisions of article 16, § 11, *supra*.[48] Hence, it would seem to follow, the commission was free, until the legislature enacted § 19a of the act, to require that bartenders be licensed.

It thus becomes crystal-clear that the people of Michigan themselves, speaking through the State's fundamental law, have expressed the intent and declared public policy to be that the alcoholic beverage traffic, including the retail sales thereof, shall be suject to the most rigid control;[49] and it

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[45]
Noey v. City of Saginaw, 271 Mich. 595.

[46]
Kelly v. Liquor Control Commission, 280 Mich. 693.

[47]
Liquor Control Commission v. Fraternal Order of Eagles, 286 Mich. 32.

[48]
Terre Haute Brew. Co. v. Liquor Control Commission, 291 Mich. 73, 78.

[49]
Michigan is one of 17 states which, since the repeal of prohibition, National and local, have employed monopoly control of the liquor traffic. See Vol. Four, 'Marketing Laws Survey—State Liquor Legislation', WPA, 1941, Government Printing Office.

is equally plain that no person, under such a system, has a constitutional right to hold a liquor license of any kind;[50] that the sale of intoxicating beverages at retail is a privilege, and that no individual may complain if the legislature or the commission by statute or uniform rule or regulation, withholds such a privilege from any group to which he belongs.

We, therefore, respectfully submit that § 19a of the Michigan liquor control act is entitled to the strongest possible presumption of validity, and that it should if possible, on any conceivable theory, be sustained as against the contention that it violates the due process or equal protection clauses of the Federal Constitution.

3

The second proviso of § 19a, supra, does not set up an arbitrary classification, nor does it violate the equal protection clause.

Appellants urge that § 19a constitutes an unjust classification as to sex because it discriminates against:

(a) women owners of licensed liquor establishments;

(b) women bartenders;

(c) the daughters of female owners of bars; and

(d) between waitresses and female bartenders.

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[50] Case v. Liquor Control Commission, 314 Mich. 632, 643.

and they point out the injustice said to be suffered by members of each group, with special emphasis upon women owners of licensed liquor establishments.

It is our position that the classification set up in § 19a is not nearly so complicated as counsel thinks; that its validity should be judged exclusively by the terms of its second *proviso,* which creates a reasonable *exception* from the general rule; and that so tested, the section evinces no legislative intent arbitrarily or with malice to select as the object of unfair discrimination, or oppression, the members of any particular group listed above.

The language of § 19a here under scrutiny reads:

> "Each applicant for license shall be a male person, . . . *Provided,* That the wife or daughter of the male owner of any establishment . . . may be licensed as a bartender by the commission under such rules and regulations as the commission may establish" . . .

1. Obviously, the section would have been valid if the legislature had stopped with the general clause excluding *all* female persons from the occupation of bartender. While discriminations against women as such are invalid, discriminations against them in matters relating to intoxicating liquors have consistently been upheld, 12 Am. Jur., Constitutional Law, § 497,

> *Cronin v. Adams,* 192 U.S. 108, 144, following
>
> *Crowley v. Christensen,* 137 U.S. 86.

2. Certain rules and tests may be invoked:

> "The legislature is free to make classifications in the application of a statute which are relative to the

legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made",

Asbury Hospital v. Cass County,
326 U.S. 207, 214, per Mr. Chief Justice Stone.

Mr. Justice Reed has said:

" . . . the power of the legislature to classify is as broad as its power to prohibit. . . A violation of the 14th Amendment in either case would depend upon whether there is any rational basis for the action of the legislature",

Sage Stores v. Kansas, 323 U.S. 32, 35, upholding as valid the Kansas 'Filled-milk Law'.

In sustaining a statute of Iowa which granted a permit to deal in intoxicating liquors and required all applicants to be electors, thus excluding women from the privilege, the supreme court of that State had this to say:

"The business of dealing in intoxicants is peculiarly within the control of the State. It may prohibit the traffic in its entirety. It may prescribe the qualifications of the persons to whom the right to sell is granted, and the fact that a permit is given to one person or class of persons neither works nor implies the denial of any constitutional right to the person or class of persons to whom it is refused.

" . . . We think it competent for the legislature to act upon the theory that as a rule retail dealing in intoxi-

cants by women is opposed to sound public policy, and that so long as the State chooses to exercise its right to regulate the traffic and minimize its admitted evils it may constitutionally deny permits to persons of that sex. . . . . The discrimination between the sexes is neither arbitrary nor capricious, and the fact that in many instances individuals of one sex are in general better fitted than those of the other sex for a given occupation or business is one of such common knowledge and observation that the legislature may properly recognize it in enacting regulations therefor".

In re Application of Carragher,
149 Iowa 225, 128 N. W. 352.

In short, the general rule seems to be that the question of such classification is for the legislature whenever there is room for fair debate.

This court, speaking of the reasonableness of a municipal ordinance which conditioned the right to drill for oil or gas within the limits of a city, had this to say:

"Whether the judgment of the common council in the present case was wise, or whether the requirements will produce hardship in particular instances, are matters with which this Court has nothing to do. . . . If there be room for fair debate, this Court 'will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question'. *Zahn v. Board of Public Works,* 274 U. S. 325, 328; *Standard Oil Co. v. Marysville,* 279 U. S. 582."

Gant v. Oklahoma City, 289 U. S. 98, 102.

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Federal:

Judicial Code, § 266, 28 U. S. C. § 390 1

Mich.

Schedule of Michigan statutes, c. 1887 to ratification of prohibition amendment State Const., 1916, art. 16, § 11, regulating or restricting liquor traffic through local authorities. See footnotes 3, 4, 5, and 6 2–3

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Act No. 338, Pub. Acts Mich. 1917, 2 Comp. Laws 1929, § 9138 et seq., Stat. Ann. § 2,331 et seq., the prohibition law of Michigan 3

State Const., article 16, § 11, as amended in November 1932, repealing prohibition, and substituting 'complete control' of alcoholic beverage traffic in Michigan, to be exercised by a commission (defendant) created by legislature 3, 4, 19, 20

Michigan liquor control law, enacted pursuant to the constitutional mandate or article 16, § 11, supra 4, 13, 15, 20, 23

Section 19a of Michigan liquor control act, added by amendatory Act No. 133 Pub. Acts 1945, Mich. Stat. Ann. 1947 Cum. Supp. § 18.990-1, the section here in question, cited on nearly every page of this brief.

Text Books, etc.

Vol. II, Michigan Pleading & Practice, Callaghan, Chicago, publishers, § 21.16, p. 14 10

Vol. 4, 'Marketing Laws Survey — State Liquor Legislation', compiled by WPA 1941, Government Printing Office 21

Black on Intoxicating Liquors, 1892, § 46, p. 61 32

12 Am. Jur., Constitutional Law, § 467, pp. 126-127 16

30 Am. Jur., Intoxicating Liquors, § 39, p. 278 18

In the

Supreme Court of the United States

October Term, 1948

No. 49

VALENTINE GOESAERT, MARGARET GOESAERT, GERTRUDE NADROSKI and CAROLINE McMAHON,
Appellants,

v.

OWEN J. CLEARY, FELIX H. H. FLYNN and G. MENNEN WILLIAMS, Members of the Liquor Control Commission of the State of Michigan,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan

BRIEF FOR APPELLEES

B. As counsel correctly states, the prevailing and dissenting opinions of the three judges who heard appellants' application for injunction to restrain the operation of a state statute,[1] are reported in Goesaert v. Cleary, (1947) 74 F. Supp. 735.

C. Counsel's statement of jurisdiction, noted by the Court on May 24, 1948, 68 Sup. Ct. 1340, is likewise accurate.

[1] The three-judge-court was convened pursuant to the Judicial Code § 266, as amended, 28 U.S.C. § 390.

D

Counter Concise Statement of the Case.[2]

Though willing to accept counsel's concise statement, we deem it helpful, if not essential to a clear understanding of the nature of the questions involved, to set forth the following brief history of Michigan liquor legislation:

1. Prior to the era of prohibition, legislative enactments provided no centralized, state-administrative control of the liquor traffic in Michigan, but such laws delegated to municipal authorities the regulation and licensing thereof,[3] or prohibited the sale of intoxicating beverages within defined areas,[4] or to minors,[5] and permitted the exercise of

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[2] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of the record.

[3] Act No. 313, Pub. Acts Mich. 1887, 2 Comp. Laws Mich. 1915, § § 7031-7069, providing for the taxation, licensing and regulation of the business of manufacturing, selling, etc., of spirituous and intoxicating liquors, § 4 forbidding approval of such a license for any woman. Supplemental Act No. 169, Pub. Acts Mich. 1915, 2 Comp. Laws, id., § § 7070-7071.

[4] Act No. 8, Pub. Acts Mich. 1893, 2 Comp. Laws Mich. 1915, § § 7126-7130, forbidding such sales upon waters of State outside boundaries of municipal units; Act No. 189, Pub. Acts Mich. 1887, 2 Comp. Laws Mich. 1915, § § 7131-7132; prohibiting sale or gift of liquor to any inmate of the Michigan Soldiers' Home; Act No. 31, Pub. Acts Mich. 1887, 2 Comp. Laws 1915, § § 7133-7136, forbidding maintenance of saloons etc. within 1 mile of the soldiers' home; and Act No. 110, Pub. Acts Mich. 1915, 2 Comp. Laws 1915, § § 7137-7139, prescribing the sale of liquor, in lumber camps.

[5] Act No. 160, Pub. Acts Mich. 1909, 2 Comp. Laws Mich. 1915, § § 70-72-7075.

local option.[6] The State Constitution was silent on the subject.

2. In November 1916, the people of the State of Michigan amended article 16 of the Constitution of 1908 by adding thereto a section to stand as § 11 thereof which after April 30, 1918 prohibited the manufacture, safe, keeping for sale, giving away, bartering or furnishing of any intoxicating liquors, except for medicinal, mechanical, scientific or sacramental purposes.[7]

Act No. 338, Pub. Acts Mich. 1917, 2 Comp. Laws 1929, § 9138 et seq., Stat. Ann. § 2.331 et seq., implemented the foregoing constitutional provisions.[8]

3. At the general election held in November 1932, the people of the State repealed the prohibition provisions of 1916 by amending article 16, § 11, of their Constitution to read as follows:[8a]

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[6]

Act No. 207, Pub. Acts 1889, 2 Comp. Laws Mich. 1915, § § 7080-7117; and Act No. 381, Pub. Acts Mich. 1913, 2 Comp. Laws id., § § 7118-7125.

[7]

We venture the opinion, gathered from the history of the times, that the people of the State of Michigan ratified the prohibition amendment of 1916 for the reason, inter alia, that they had revolted against corrupt political-ward-czardoms headed by saloon keepers.

[8]

Act No. 309, Pub. Acts 1929, 1 Comp. Laws 1929, § 121, Mich. Stat. Ann. § 2.331, repealed as obsolete the regulatory acts listed in footnotes 3, 4, 5, and 6, ante.

[8a]

The 21st Amendment to the Federal Constitution, was ratified on Dec. 5, 1933. United States v. Chambers, 291 U. S. 317. Hence, it is apparent, these tides of public opinion were National in their sweep.

"The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise *complete control* of the alcoholic beverage traffic within this state, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Provided, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same". [Emphasis added].

On December 15, 1933, in furtherance of the foregoing constitution mandate, the act in question creating the Michigan liquor control commission,[9] was enacted.[10]

It is, we think, important to note that all power exerted by the commission emanates from the Constitution, not from the law of its creation.[11]

Section 19a of the act (here challenged on constitutional grounds) was added in 1945 and became effective on the 30th day of April.

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[9]

Act No. 8, Pub. Acts Mich. 1933, Ex. Sess., Comp. Laws Supp. 1935, § § 9209-16-9209-72, Mich. Stat. Ann. § § 18.971-18.1028.

[10]

Between the effective date of the constitutional amendment in 1932, and the effective date of the present liquor control act in December 1933, the liquor traffic was governed by the prohibition statute of 1917, and by Act No. 64, Pub. Acts 1933, which repealed it.

[11]

Decisions sustaining this view are cited in argument. See, e.g., Fitzpatrick v. Michigan Liquor Control Commission, 316 Mich. 83.

In our printed 'Statement Opposing Jurisdiction', p. 3, we were mistaken in asserting that the Supreme Court of the State of Michigan, in the recent case of *Fitzpatrick v. Liquor Control Commission* (Dec. 2, 1946), 316 Mich. 83, 172 ALR 620, upheld the constitutional validity of § 19a of the Michigan liquor control act as against the *identical* objections here urged by appellants, for, unlike the case at bar, no female bar *owners* were parties to that litigation. Hence, the highest court of the State has not yet had occasion to construe the language of § 19a for the purpose of determining whether its provisions require such licensed *owners* also to be licensed as *bartenders*.[12]

E

The Questions Presented.

Counsel for appellants specifies the 11 errors assigned in the printed record (78-80), and in argument groups them under 5 heads, raising as many constitutional questions:

1. Does the requirement of § 19a, that licenses must first be obtained by any person who desires to act as bartender in any establishment licensed under the act to sell alcoholic liquor for consumption on the premises '*in any city now or hereafter having a population of 50,000 or more,*' set up 'an arbitrary and unreasonable classification'?[13]

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[12] Although this is an injunction suit, rather than a declaratory judgment proceeding, we feel we should invite attention to the principles enunciated for the Court by Mr. Chief Justice Stone in Federation of Labor v. McAdory, 325 U. S. 450, 471.

[13] Assignment of Error No. 1 (79), appellants' brief, pp. 7-9.

2. Is § 19a of the Michigan liquor control act (a) an unfair and unjust classification as to sex, or (b) an unfair discrimination against women owners of liquor establishments, (c) women bartenders, (d) daughters of female owners of bars, and (e) between waitresses and female bartenders?[14]

3. Is § 19a of the act repugnant to the 14th Amendment to the Constitution of the United States in that it creates an unreasonable and arbitrary classification, and denies the plaintiffs the equal protection of the laws?[15]

4. Did the court below give adequate consideration to the admitted facts alleged in plaintiff's complaint, and was the majority opinion (59-64) based upon conjecture and supposition?[16]

5. Is the decision of the court below, dismissing plaintiff's compiaint, contrary to the law?[17]

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[14]

Assignments of error Nos. 2-6, inclusive, appellants' brief, pp. 10-21.

[15]

Assignment of error No. 7 (79), appellants' brief, pp. 22-31. It is quite apparent that Questions 2 and 3 are closely related and may be considered as one, since appellants must necessarily rely on the equal protection clause in each instance.

[16]

Assignments of error Nos. 8-10, appellants' brief, pp. 31.34.

[17]

Assignment of error No. 11 (80), appellants' brief, pp. 34-37).

F

Summary of the Argument.

We respectfully state our position on each of the foregoing questions:

First:

We agree with the writer of the majority opinion (60) that the classification by population set up in § 19a is not unreasonable or repugnant to the Federal Constitution. The legislature 'may have reasonably concluded that the need for regulation of women bartenders was much more urgent in the larger cities'. The question is controlled by this Court's decision in

Radice v. People of the State of New York, 264 U.S. 292.[18]

The dissenting member of the court below did not discuss (65-74) this particular question, and we assume he found no fault in the majority opinion on the point (60).

Second:

Third:[19]

1. State legislation governing the alcoholic beverage traffic falls into its own peculiar category and without vio-

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[18] Upholding act prohibiting employment of women in restaurants in N. Y. cities of first and second class, during night hours.

[19] Since Questions II and III are so closely related, they will be considered as one.

lating the Federal Constitution may provide more rigid regulations than those imposed upon useful and ordinary occupations,[20] and hence, we respectfully submit, a State, in controlling such traffic, may draw fine lines of distinction in classification.[21]

2. *A fortiori*, a liquor law enacted pursuant to a constitutional mandate to establish a liquor control commission, who, 'subject to statutory limitations, shall exercise *complete control* of the alcoholic beverage traffic' within the state, should not be invalidated by a federal court on the ground that it contravenes the equal protection clause of the 14th Amendment, unless such violation be found plainly flagrant and without any relation whatsoever to the object of the constitutional provision aforesaid.

3.

(a) The Michigan legislature, in setting statutory limitations upon the liquor control commission's exercise of 'complete control of the alcoholic beverage traffic',[22] could have excluded *all* women from the bars of licensed retail establishments,[23] and it was not bound to extend such

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[20]

This Court has never, in its entire history, declared such a law invalid.

[21]

For authority and e.g., see: Mugler v. Kansas, 123 U.S. 623; Crowley v. Christensen, 137 U.S. 86; Holden v. Hardy, 169 U.S. 366, 392; Cronin v. Adams, 192 U.S. 108; Eberle v. Michigan, 232 U.S. 700, 706; and Hudson Bergen County Retail Liq. Stores Ass'n v. Hoboken, N.J., 52 A. 2d 668, 670. Other decisions will be discussed in argument.

[22]

Mich. Const. 1908, art. 16, § 11, as amended in 1932.

[23]

Anderson v. City of St. Paul, Minn., 1948, 32 NW 2d 528.

regulations to all cases it might possibly reach.[24] And since there is room for fair debate[25] over narrow distinctions which suffice to sustain a legislative classification,[26] it cannot be said with that degree of certainty essential to overcome the strong presumption of validity attending any liquor legislation, that the classification set up in § 19a is wholly arbitrary.

(b) The differences between the classes established by this law are pertinent to the subject with respect to which the classification is made; and therefore § 19a meets the ultimate test of validity.[27]

Specif., it may be noted that if the section here challenged bears any constitutional faults, they lie in its second *proviso*.

The broad, general purpose expressed by the legislature in the body of § 19a is to admit male persons and male persons only to the precincts of the bar in any establishment licensed under the act to sell alcoholic liquor for consumption on the premises, and to exclude all female persons therefrom, and had the language of the section stopped there, it would concededly be valid, but it is

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[24]
West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400; 108 ALR 1330; Fed. of Labor v. McAdory, 325 U.S. 450, 471-472, and cases cited.

[25]
Gant v. Oklahoma City, 289 U.S. 98, 102, and cases cited.

[26]
German Alliance Inc. Co. v. Kansas, 233 U.S. 389, 418; and cases cited, in footnote 21.

[27]
Asbury Hospital v. Cass County, 326 U.S. 207, 214; Sage Stores v. Kansas, 323 U.S. 32, 35; Anderson v. City of St. Paul, 32 NW 2d 528.

"*Provided*, That the wife or daughter of the male owner of any establishment (so licensed) . . . may be licensed as a bartender by the commission under such rules and regulations as the commission may establish".

The only question, then, is whether the two exceptions made in the foregoing *proviso*, are pertinent to the subject of such legislation, and whether such exceptions are unreasonable.

We respectfully submit, in view of the authorities cited, that the relationship between an owner-husband and his wife, or between an owner-father and his daughter, justifies the exceptions made in the *proviso*, and that the exemptions rest upon a reasonable classification.

Fourth:

While it is perfectly true that facts *(well pleaded)* in a complaint, must be considered as true in face of a motion to dismiss (in the nature of a demurrer), it does not follow that conclusions of the law stated in such a complaint may not be questioned.[28]

Appellants contend, brief, p. 21, that the majority opinion below "is based upon conjecture and supposition; that the

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[28]

Vol. II, Michigan Pleading and Practice, § 21.16, p. 14, states the rule: 'It is not the purpose of a pleading to state the legal conclusions or personal opinions of the pleader. Any such statements are surplusage, and have no proper place in pleading. If there are not sufficient averments of fact or ultimate fact to show a cause of action or defense without them, they are insufficient in and of themselves to state one or to bolster inadequate fact allegations'. At the close of the section, however, the author notes that the modern tendency is not to regard such distinctions too critically.

plaintiffs' allegations of fact were admitted, and should have been considered by the lower court'.

We reply:

(1) The majority opinion was not based upon mere conjecture and supposition when it conceived a state of facts that would sustain the validity of the classification set up in § 19a, *supra*. The rule of this Court is that distinction in legislation does not deny equal protection of the law if any state of facts can be conceived that will sustain it;[29] and where a state of facts so conceived, or their effect, might be disputed, the question became one for the legislature to decide, for courts cannot arbitrate such differences of fact or opinion.[30]

(2) The amended complaint (8-14) sets forth few ultimate facts, and any issue of fact suggested therein, or in-

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[29]

Rast v. Van Deman & Lewis, 240 U.S. 357;
Cf. Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194;
Metropolitan Co. v. Brownell, 294 U.S. 580;
Asbury Hospital v. Cass County, 326 U.S. 207, 215.

[30]

Price v. Illinois, 238 U.S. 446, 452-453, where the Court applies the same rule to a question of due process:

"It is plainly not enough that the subject should be regarded as debatable. If it is debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided".

Clearly there is room for fair debate when the question is whether women should be excluded from the occupation of bartender, and whether any members of that general class should be excepted from the rule, and, that being so, the question is exclusively for the lawmakers of the State. Motives cannot be inquired into:

> "This Court cannot inquire into the motives of legislators in enacting laws, except as they may be disclosed on the face of the acts, or be inferrible (sic) from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments".
>
> *Soon Hing v. Crowley,* 113 U. S. 703, 710.
>
> "This Court, on writ of error from a state court cannot inquire into the motives or arguments which influence men to vote for or against a measure",
>
> *Eberle v. Michigan,* 232 U. S. 700, 705.

It is our position that no ulterior motives appearing on the face of the act can be ascribed to the legislators of Michigan in enacting the law here in question.

Another principle here applicable is that the legislature of a State is not bound to extend its regulation to all cases which it might possibly reach.

> ". . . . a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise.

A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Company v. Union County Bank*, 207 U. S. 251".

German Alliance Insurance Co. v. Kansas, 207 U. S. 251.

As Mr. Justice Hughes had occasion to say:

". . . . it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences; it is impossible to deny to the legislature the authority to take account of these differences and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will as a whole fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one considered in its general application, the classification is not to be condemned".

Miller v. Wilson, 236 U. S. 373, sustaining minimum-hour law of California which excepted from the benefits of the act certain classes or groups of women employes.

Later, as Chief Justice, this same great jurist also said for the Court:

> "The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulations to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest'. If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might be applied'. There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms (citing authorities)".

West Coast Hotel Co. v. Parrish, 300 U. S. 379, 400.

We pause long enough to observe that this principle sustains the legislative discretion exercised in excluding from the regulation the wife or daughter of a male owner, and in failing to include waitresses within the category. There is no force to the arguments that women who serve liquor at table should be required to be licensed.

See, also, *Federation of Labor v. McAdory,* 325 U. S. 450, 471, where the Court say:

> "The Constitution does not oblige a state to regulate or reform all types of associations and organizations, or none. It may begin with such as in its judgment most need regulation".

It all boils down to this:

Section 19a, *supra*, so far as questioned by appellants, requires *all* bartenders to be licensed, and, in sweeping terms it provides that *all* applicants shall be male persons, which, of course, excludes *all* women from such occupation. Then, by its second *proviso*, the section makes one and only one exception to the general rule: 'the wife or daughter of the male owner of any establishment'.

We respectfully submit, in view of the foregoing principles, that the classification is not invalid, and it should be sustained if for no other reason than that it is based upon the relationship of husband and wife, and parent and child.

Before we close this section of the brief, we desire to correct the impression which counsel seems to have, brief, p. 10, that in the case of *Fitzpatrick v. Liquor Control Commission*, 316 Mich. 83, 172 ALR 608, the Supreme Court of that State decided no federal questions. A careful reading of the opinion will disclose that counsel is mistaken.

While it is true that in the case of *Fitzpatrick*, no woman owner of a licensed establishment appeared as plaintiff, the court did say, 316 Mich. 92:

> "These claims are based, in part, on article 2, §§ 1 and 16, of the Michigan Constitution (1908), and amendment 14, § 1, of the United States Constitution, which are commonly referred to as the due process and equal protection provisions of the State and Federal Constitutions. The essence of plaintiffs' claim in that regard is that they are deprived of equal protection of the law, and that the amendment by section 19a is unconstitutional class legislation".

And in discussing the constitutional questions, the court cited many of the decisions of this Court on which we now rely.

We commend to this Court a reading of the well-reasoned opinion of the Michigan court in the case of *Fitzpatrick*, and we respectfully submit that the liquor control act of that State, § 19a, does not deny to appellants equal protection of the laws.

Point Three [51]

The majority opinion was not based upon mere conjecture or supposition, and it gave adequate consideration to the admitted facts alleged in plaintiffs' complaint.

This point, we think, is fairly-well covered (we hope) in our summary of the argument.

We, as there indicated, rely on the principle so often declared by this Court in the decisions cited in footnote 29, this brief, *viz.*, that where any state of facts can be conceived that will sustain a legislative classification, even though such facts or their effect may be disputed, a distinction does not deny equal protection of the laws. Or, putting it another way, courts will not arbitrate such differences of fact or opinion, since such a prerogative belongs exclusively to the legislature.

Appellants urge, brief, p. 32, that the court below, as well as the State, was bound to accept as true plaintiffs' allegation 'that the liquor traffic is adequately controlled

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[51]

Question IV, appellants' brief, pp. 31-34, assignments of error Nos. 8-10.

and regulated by previous statutes and rules and regulations of the defendants' (6, 13).

Our answer is that if this is sound doctrine, the legislature would be powerless to amend the liquor control act without being subject to judicial review of legislative policy.

Moreover, aside from the foregoing, the complaint sets forth very few facts; the bulk of the pleading consists of legal conclusions.

Point Four [52]

Section 19a, supra, does not deprive appellants of property without due process of law.

Appellants contend that § 19a is not a valid exercise of the police power, the argument being that such legislation is an arbitrary and unjustifiable attempt at classification within a classification, which results in a denial of the equal protection of the laws; and since the result is that those plaintiffs who own liquor establishments 'will either have to close their places of business or hire male bartenders', and since they will lose a vested interest in that event, they are deprived of their property without due process of law.

The question, we think, is controlled by decisions of this Court cited in footnote 21 of this brief, each of which is much to the effect that no one can acquire a vested interest

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[52] Question V, appellants' brief, pp. 34-37, covering assignments of error No. 11.

in the business of selling intoxicating beverages, and that such business comes squarely within state police power.

> "In the exercise of its undoubted power to regulate the traffic in intoxicating liquors, the legislature of a state may lawfully provide a system of licenses to sell at retail, and may impose such restrictions and conditions upon the granting of such licenses; and as to the qualifications necessary to secure them, and may provide such causes for the forfeiture and revocation of licenses, as it may deem necessary and proper".
>
> Black on Intoxicating Liquors, 1892, § 46, p. 61, citing the leading case of *Crowley v. Christensen*, 137 U. S. 86.

So far as we can ascertain, that doctrine has never been abrogated or modified by this Court.

G.

Conclusion

We respectfully submit: (1) that the classification by population set up in § 19a of the Michigan liquor control act, is a reasonable exercise of legislative discretion; (2) that fine or narrow lines of distinction may be drawn by the legislature in regulating the retail sale of liquor; *a fortiori* where, as here, the people of a State have established in their Constitution a system of 'complete control' of such traffic, a stronger presumption of validity should be indulged; and, therefore, the classification of bartenders in § 19a, supra, is not arbitrary; (3) that the court below gave adequate consideration to facts well-pleaded in plaintiffs' complaint; and (4) that § 19a, *supra*, does not deprive plaintiffs of their property without due process of law.

We, therefore, respectfully submit that the judgment of the lower court should be affirmed.

Respectfully Submitted,

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Counsel for Appellees

Supreme Court of the United States

1947 TERM

WILLIAM SHAPIRO,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

No. 49

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*, IN SUPPORT OF APPLICATION FOR REHEARING

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
OSMOND K. FRAENKEL,
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C. DICKERMAN WILLIAMS,
Of the New York Bar,
Of Counsel.

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The American Civil Liberties Union, which is devoted to the implementation and expansion of the civil liberties guarantees contained in the Constitution, joins with petitioner in requesting this Court to grant a rehearing in this case because it believes that the effect of the case is so far-reaching in its restriction of the privilege against self-incrimination that it warrants reconsideration.

When this Court decided the case of *Davis v. United States*, 328 U. S. 582, the American Civil Liberties Union was concerned with the effect which that case had upon the guarantees against unreasonable searches and seizures contained in the Fourth Amendment, and noted particularly the distinction which the Court then made between public and private papers. We feared that that case might indicate a reversal of the previous trend of this

Court which had been so solicitous of the guarantees contained in the Fourth Amendment.

That decision was carried perhaps a step further in *Harris* v. *United States*, 331 U. S. 145, where again the fact was stressed that the property involved was property which the government had a right to the possession of.

While these cases may have weakened the protection of the guarantee of the Fourth Amendment by permitting seizures without warrant, the impact of the cases was at least restricted to property which was concededly public and not private property. By the decision in the case at bar the impact of those earlier cases is immeasurably extended in the field of search and seizure and the privilege against self-incrimination is to all intents and purposes nullified over the whole area of activities which any agency of government has a right to supervise or regulate.

We join with the dissenting Justices in suggesting that this is a complete change in the position heretofore taken by this Court. As was meticulously pointed out by Mr. Justice Frankfurter, no previous decision of this Court lends weight to the contention of the majority that the records here involved are outside of the protection of the privilege against self-incrimination. It would be a vain labor to repeat his analysis of the decisions relied upon by the majority.

We wish to add only the following observations. We have seen in the past quarter-century a tremendous increase in the areas with which government regulation has concerned itself. This tendency is not likely to be reversed, but on the contrary may be further increased. Obviously it is important in connection with any government agency concerned with regulation of a segment of the life of the people, that means may be readily available to enforce the objective of the legislation which it is

charged with administering. An inevitable step in this direction is the requirement that records be kept. The decision of this Court, while recognizing that there may be a limit to the requirement that such records be kept, makes no suggestion of any criterion for determining when the bounds have been exceeded. To be sure, the opinion indicates that if the purpose to be served by the regulatory law is beyond the power of the legislature, the requirement for the keeping of records does not deprive the keeper of the privilege against self-incrimination. But that is a concession of no consequence since obviously if the purpose is beyond the legislative power the requirement to keep records is likewise without sanction.

We believe that the true criterion for determination as to what records are beyond the protection of the privilege against self-incrimination must be found in a consideration of the character of the records themselves. Whenever the records are actually public, that is, commonly open for public use and inspection, then clearly they are not protected. Likewise the same result should follow whenever the records deal with a subject matter which is inherently public, such as those dealing with government property or government activities. It may even be proper to extend this doctrine to businesses which are affected with the public interest in the sense that they may function only as the result of a franchise from the public. It is essentially for this reason that the privilege against self incrimination has never been extended to corporations.

The adoption of the foregoing criteria would, of course, leave within the protection of the privilege records such as those involved in this case, records of a purely private business conducted by a private individual without franchise from the state. To permit this but preserves the

spirit of the privilege against self-incrimination and need not unduly impair the efficacy of the administration of the regulatory legislation.

Most regulatory legislation imposes civil as well as criminal sanctions. With regard to the enforcement of the civil sanctions, the privilege does not stand in any way as a barrier. Modern experience has shown that in many situations civil sanctions prove more effective than criminal ones in the carrying out of reforms. Thus, criminal statutes against racial discrimination have generally proved ineffective, whereas civil proceedings looking toward a cease and desist order have had much greater effectiveness. The most notable instance of the use of this mechanism has, of course, been in the field of labor relations where it has achieved a minor revolution.

In view, therefore, of the far-reaching consequences of the decision in this case and the fact that no previous decision of this Court requires, if indeed it presages, the result here reached, we respectfully join in the application that a rehearing be permitted so that the grave constitutional question can be further and more extensively argued.

Respectfully submitted,

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